88-2086

Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

October Term, 1988

AMADO SALAZAR-CALDERON, et al.,

*Petitioners,*

vs.

PRESIDIO VALLEY FARMERS ASSOCIATION, et al.,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether the decision of the Fifth Circuit to deny relation-back effect to the two classes certified by the district court on remand, after an earlier appellate opinion invited the trial court's reconsideration of the certification decision, conflicts with decisions of this court and those of other circuits.

2. Whether the court of appeals erred in reversing the district courts' interpretation of the mandate where defendants did not object to that interpretation in the district court or on appeal.

## PARTIES TO THE PROCEEDINGS BELOW

*Petitioners*:

The petitioners in these consolidated cases are 507 migrant farm workers from Northern Mexico who were admitted into the United States under temporary "H-2" visas to provide labor in the Presidio Valley of Texas during the 1977 and 1978 agricultural seasons. Most of the plaintiffs reside in the City of Ojinaga, Chihuahua, Mexico or in the surrounding areas of Northeastern Mexico. A list of the Petitioners who were plaintiffs in the litigation arising from the 1977 growing season is included in the Appendix as Exhibit A; Exhibit B includes those who were plaintiffs in the 1978 case.

*Respondents*:

The respondents are the following corporations, partnerships and individuals who were engaged in farming enterprises in the Presidio Valley in the period from 1977 to 1979:

1. Presidio Valley Farmers Association, Inc. – a non-profit membership corporation composed of the individual members whose names follow:
2. Presidio Valley Farms, Inc. – a for-profit corporation owned by Griffin & Brand of McAllen, Inc. (1/2 share) and the family of Billy Joe Bishop of Marfa, Texas
3. Billy Joe Bishop, Marfa and Presidio, Texas
4. Terry Bishop, Marfa and Presidio, Texas
5. Oscar Spencer, Presidio, Texas
6. A. B. Foster, Pecos, Texas

**PARTIES TO THE PROCEEDINGS BELOW** (continued):

7. Presidio Produce, Inc. – a for-profit corporation owned by A. B. Foster and Richard Slack
8. K. C. Produce, Presidio – a partnership composed of Charles Weinacht and several passive investors from Kansas City, Missouri
9. Charles Weinacht, Pecos, Texas
10. Joe Turner, Presidio, Texas
11. Madeira Valley Farms, Presidio, Texas
12. Victor Thiel, Presidio, Texas
13. Trinidad Pena, Redford, Texas
14. Rosendo Evaro, Redford, Texas
15. Francisco Armendariz, Presidio, Texas
16. Alberto Armendariz, Presidio, Texas
17. Carlos S. Armendariz, Presidio, Texas
18. Demetrio Carrasco, Redford, Texas
19. Teofilo Carrasco, Redford, Texas
20. Pablo O. Carrasco, Redford, Texas
21. Jesus B. Carrasco, Redford, Texas
22. Calixtro Carrasco, Redford, Texas
23. Antonio Pena, Redford, Texas
24. Hector Morales, Redford, Texas
25. Jose Rodriguez, Redford, Texas
26. Raul Madrid, Redford, Texas
27. Larencio Brito, Redford, Texas

PARTIES TO THE PROCEEDINGS BELOW (continued):

28. Manuel Franco, Redford, Texas
29. Ruben H. Madrid, Redford, Texas
30. Cecilio Morales, Redford, Texas
31. Flavio Estrada, Redford, Texas
32. Luis Armendariz, Presidio, Texas

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## DECISIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit for which petitioners seek review is reported as *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 863 F.2d 384 (5th Cir. 1989), and a copy is included in the Appendix as Exhibit C. The order of March 20, 1989, denying petitioners' motions for rehearing and rehearing en banc is included as Exhibit D.

In addition, the Appendix includes the opinions of the Fifth Circuit from the first appeals in these cases, in which the judgments of the Western District of Texas

entered on February 3, 1984, were affirmed in part, reversed in part, and remanded for further proceedings. *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334 (5th Cir. 1985), *cert. denied*, 475 U.S. 1035 (1986), is in Exhibit E, and *Presidio Valley Farmers Ass'n v. Brock*, 765 F.2d 1353 (5th Cir. 1985), *cert. denied sub nom. Madrid v. Montelongo*, 475 U.S. 1035 (1986), is included as Exhibit F. On remand the district court entered orders certifying class actions in both cases (Exhibits G and H), consolidated the cases for trial, and entered judgments for the plaintiffs on June 17, 1987. A copy of the district court's Memorandum Opinion and Order is included as Exhibit I and the Judgments are included as Exhibit J.

## JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1) (1988). The opinion of the United States Court of Appeals for the Fifth Circuit was filed on January 20, 1989. Petitioners' timely motions for rehearing and rehearing en banc were denied by the court of appeals on March 20, 1989.

## RULE INVOLVED

Rule 23, Federal Rules of Civil Procedure:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to

the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(B) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * *

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court

will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) ~~Orders in~~ Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that

the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

* * *

## STATEMENT OF THE CASE

These class actions were filed by several hundred Mexican farm workers who were employed by the Presidio Valley Farmers Association and its members in 1977 and 1978.[1] Pressured by a Border Patrol threat in early

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[1] The procedural history of these cases is complex, if not tortuous. The first case was filed by the growers against the government in an effort to compel the federal agencies to issue temporary visas to Mexican farm workers for use during the 1978 harvest season. *Presidio Valley Farmers Ass'n v. Marshall*, No. EP-78-CA-95 (W.D.Tex.-El Paso Div.). Two months later the Mexican workers moved to intervene in that action to enforce the labor standards of the U.S. Department of Labor. On April 27, 1979, six of the Mexican workers, who had worked under similar visas the previous season, filed a class action for damages on behalf of 809 of their fellow workers during the 1977 season. *Lara-Vargas v. Presidio Valley Farmers Ass'n*, No. EP-79-CA-85 (W.D.Tex.-El Paso Div.). The district court stayed all proceedings pending its determination of motions to dismiss and for class certification. That stay remained in effect for over a year, until the plaintiffs filed a petition for writ of mandamus in the Court of Appeals. *In Re Lara-Vargas*, No. 81-1134 (5th Cir. March 24, 1981). Immediately thereafter, the El Paso Division ruled on the pending motions, and 251 named individual

(Continued on following page)

1977 to step up enforcement against the growers' traditionally undocumented workforce, the Association petitioned the Secretary of Labor and the Immigration Service to permit the entry of 809 temporary foreign workers under the "H-2 Program."[2] The Labor Department denied certification of the need for foreign workers because the growers refused to make job offers to U.S. workers that met the Department's regulatory standards. Disregarding the objections of DOL, INS issued the visas for the 1977 season.

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workers filed two new class actions in the Pecos Division. *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, No. P-81-CA-23 (W.D.Tex.-Pecos Div.), alleged claims under the Farm Labor Contractor Registration Act, 7 U.S.C. §§ 2041 - 2056 (1976), and *Primero v. Presidio Valley Farmers Ass'n*, No. P-81-CA-24 (W.D. Tex.-Pecos Div.), alleged claims for damages under several different contract theories. After the Pecos Division denied class certification in *Salazar* and *Primero*, another group of workers sought to intervene, was denied, and 235 members of that group filed a fourth action involving claims from the 1977 season. *Zuniga v. Presidio Valley Farmers Ass'n*, No. P-82-CA-13 (W.D.Tex.-Pecos Div.). Ultimately, all four of the 1977 cases were consolidated under the *Salazar* cause number.

[2] The "H-2 Program" takes its name from the section of the Immigration and Naturalization Act that authorizes the entry of temporary workers for employment in agriculture. *See* 8 U.S.C. § 1101(a)(15)(H)(ii) (Supp. 1989). The program permits an employer to petition INS to issue nonimmigrant visas to foreign workers after demonstrating to the satisfaction of the Labor Department that insufficient numbers of U.S. workers are available and that employment of foreign workers will not adversely affect the wages and working conditions of the domestic workforce.

The working conditions and terms were not those the government and the workers had been promised. Subminimum wages were systematically paid to harvesters working on the piece-rate picking cotton, onions, and chiles; in many instances workers reported wage rates less than twenty-five cents per hour. Growers illegally charged for tools and equipment, failed to provide a $5 per week transportation allowance that had been promised, did not provide required insurance for on-the-job injuries, and did not furnish the amount of work guaranteed by the DOL regulations. Plaintiffs filed suits alleging that the growers violated their work contracts and the Farm Labor Contractor Registration Act (FLCRA), 7 U.S.C. §§ 2041 - 2056 (1976).[3] Jurisdiction of the district court was invoked pursuant to 28 U.S.C. § 1331 (1980), 28 U.S.C. § 1337 (1983), 28 U.S.C. § 1343(3) (1979), 28 U.S.C. § 1343(4) (1979), 7 U.S.C. § 2050a(a) (1976), and 8 U.S.C. § 1329 (1952). The district court denied class certification,[4] but awarded damages to several hundred workers based upon the oral testimony of fourteen sample plaintiffs and sworn statements from the non-testifying plaintiffs. In *Salazar-Calderon v. Presidio Valley Farmers Ass'n*,

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[3] FLCRA has since been replaced by the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801-1872 (1986).

[4] Certification was denied by the El Paso Division in the *Lara-Vargas* action shortly after the mandamus action was filed in the court of appeals. No discovery had been permitted and the court did not conduct a hearing on the motion for class certification which had been pending for more than a year. The Pecos Division essentially adopted the reasoning of the previous decision in denying the motion for certification in the second series of cases.

765 F.2d 1334 (5th Cir. 1985), *cert. denied*, 475 U.S. 1035 (1986), and *Presidio Valley Farmers Ass'n v. Brock*, 765 F.2d 1353 (5th Cir. 1985), *cert. denied*, 475 U.S. 1035 (1986), the Fifth Circuit held that the "sample plaintiffs" procedure was defective absent an agreement by the defendants shown on the record, and remanded for a new damages trial. The court of appeals also found that the district court had not abused its discretion when it initially denied class certification, but "in no way restricted the court's discretion to change that decision on remand." *Salazar I*, 765 F.2d at 1350.

On remand, the district court certified classes in both actions under Fed. R. Civ. P. 23(b)(3),[5] and ruled that the class members' claims related back to the date the first class complaints were filed. Notice was provided to the members of the class, and each member who had not previously responded to discovery requests was required to file a proof of claim form with the court. The district court heard seventeen days of testimony spread over a twelve-month period and awarded actual damages to the 507 class members who testified during the damages trial. The actual damages were awarded under plaintiffs' contract theories, and liquidated statutory damages were awarded for five violations of FLCRA.

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[5] From the outset of the litigation plaintiffs had consistently urged that classes be certified in both cases. Motions for certification and motions to reconsider the denial of certification were repeatedly presented to the district court. On remand, and following the suggestion of the court of appeals, the district court granted the plaintiffs' motions to reconsider the certification question.

On the second appeal, the Fifth Circuit affirmed the decision to certify classes of workers in both seasons, but held that, because the opinions in *Salazar I* and *Brock* had affirmed the denial of class status, the decision to certify the classes on remand had no relation-back effect. *Salazar II* at 390. The court decided that those workers who did not intervene or file separate actions when the first class actions were denied were barred by the two-year statute of limitations. Thus, all of the passive members who came forward in response to the class notice were deemed barred, rendering certification and notice meaningless. The court also reversed the award of damages under state contract law, holding that damages under that theory exceeded the mandate in *Salazar I*. By vacating the award of damages under state contract law, the court rendered much of the judgment uncollectible[6] and denied plaintiffs their attorneys' fees and prejudgment interest under state law.

## REASONS FOR GRANTING THE WRIT

Petitioners seek review of two decisions of the court of appeals that, taken together, have the effect of denying any recovery to more than three hundred migrant workers, of a total of 507 who were awarded damages for breach of their contracts of employment and wholesale

[6] The district court held that the members of the Association are jointly and severally liable for the contract damages but not the FLCRA damages. Thus, with the denial of contract damages, only the assetless Association is liable for damages for the 1978 season.

violations of federal labor standards. The first question presents an issue in which the Fifth Circuit has rendered a decision that is in conflict, in principal, with several decisions of this Court and the Third Circuit, although the issue in its narrowest form has not been addressed by other courts. The second issue raises "an important question of federal law which has not been, but should be, settled by this Court," Sup. Ct. R. 17.1(c), regarding the deference that an appellate court should extend to the district court in the interpretation of an admittedly vague mandate.

## I. THE DECISION OF THE FIFTH CIRCUIT TO DENY RELATION-BACK EFFECT TO THE DISTRICT COURT'S CERTIFICATION OF THE CLASSES ON REMAND CONFLICTS WITH DECISIONS OF THIS COURT AND THOSE OF OTHER CIRCUITS.

The Fifth Circuit held that the district court properly certified classes under Rule 23(b)(3) on remand from *Salazar I*, but that the claims of the class members did not relate back to the filing of the original complaint. The court of appeals drew a distinction between certification decisions that are made on remand from a *reversal* of a decision denying certification and those that are made after the appellate court has *affirmed* the admittedly interlocutory decision of a trial court not to certify the class:

> When an appellate court overturns a district court's denial of class certification, the date of original filing, rather than the date of eventual certification, is used to determine whether the claims of potential class members are time-barred. *Satterwhite v. City of Greenville*, 578 F.2d 987, 997 (5th Cir. 1978) (en banc). Were

> this rule not to apply, appeals of certification would most often be meaningless. However, here we affirmed denial of class certification, even though we invited the district court to reconsider. *Salazar*, 765 F.2d at 1350. The trial court's reconsideration of the certification issue did not, and could not, diminish the import of our affirmance for time preclusion issues. The statute should not toll for those workers who did not intervene or file individual claims after certification was denied.

*Salazar II*, 863 F.2d at 390. The court did not cite any precedent for its distinction, or offer any analysis in justification of the unique treatment to the class members in these cases. Although acknowledging that the certification decision remains interlocutory, *Salazar II* at 389, and therefore always subject to reconsideration until a final decision on the merits, the Fifth Circuit nevertheless carved out an exception to the "relation back" principle, a principle upon which class litigants have come to rely. The exception conflicts with decisions of this Court and other circuits and jeopardizes the policies promoted by the relation back rule.

Relation back is an intrinsic part of a certified Rule 23(b)(3) class. It is precisely that characteristic that distinguishes a (b)(3) action from the old "spurious" class actions in which class members were required to join before limitations ran on their individual claims. *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 549-50 (1974). To strip a certified class of its relation back effect is "simply inconsistent" with Rule 23:

> [T]he filing of a timely class action complaint commences the action *for all members of the class as subsequently determined*. Whatever the merits in the conclusion that one seeking to join a class after the

> running of the statutory period asserts a 'separate cause of action' which must individually meet the timeliness requirements, *such a concept is simply inconsistent with Rule 23 as presently drafted.*

414 U.S. at 550 (citation omitted) (emphasis added). *American Pipe* states unequivocally that "the . . . running of the applicable statute of limitations does not bar participation in the class action and in its ultimate judgment." 414 U.S. at 552.[7]

Furthermore, the notice provisions of Fed. R. Civ. P. 23(c)(2) are based on the assumption that *all* certified (b)(3) classes relate back. When such a class is certified, Rule 23(c)(2) requires that notice be given to all class members, advising that they have a right to opt out of the case, join it, or remain passive class members bound by the judgment. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-76 (1974). If a class is certified after limitations has run against the class members' claims, as frequently happens, such notice necessarily implies that their claims will relate back. Otherwise, there would be no one to take advantage of the class status and both class certification and class notice would be pointless.[8] *See Crown Cork &*

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[7] Relation back is inherently part of any certified class because in certifying a class "the court is expected to determine what the lawsuit has always been, not what it is about to become." *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 42 F.R.D. 324 (E.D. Pa. 1967), *cited in American Pipe*, 414 U.S. at 550 n.20.

[8] That is precisely what occurred in this case. Pursuant to the invitation in *Salazar I*, the district court certified plaintiffs' class and sent the required 23(c)(2) notice to the members of

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*Seal Co. v. Parker*, 462 U.S. 345, 351-52 (1983) (discussing the interplay of relation back and class notice after limitations has run on class claims).[9]

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the class. The Fifth Circuit has now held that all passive class members who came forward in response to the notice are barred by limitations.

[9] It would appear that the *Salazar I* court also intended relation back to apply and that the *Salazar II* opinion was based upon a misinterpretation of the prior mandate. All that *Salazar I* said was:

> Although we affirm the district court's refusal to certify the class, we *in no way restrict* the court's discretion to change that decision on remand. It is well settled that decisions on class certification are always interlocutory. *See, e.g., Eister v. Alexander*, 608 F.2d 196, 197 (5th Cir. 1979) ("The district court has a continuing power under Fed. R. Civ. P. 23(c)(1). The certification decision 'is not irreversible and may be altered or amended at a later date,' " *quoting* 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1785 at 137 (1971)).

*Salazar I*, 765 F.2d at 1350 (emphasis added). The court's use of the word "interlocutory" to describe the class decision is significant. "Interlocutory" means not final or definitive. It is precisely this lack of finality with respect to preclusion that makes "interlocutory" class denials unappealable by class members. *Gelman v. Westinghouse Elec. Corp.*, 556 F.2d 699, 701 (3d Cir. 1977). *Elster v. Alexander*, 608 F.2d 196 (5th Cir. 1979), the case cited by the *Salazar I* Court, dismissed an appeal from a class denial because that "interlocutory" order was not the "death knell" of the claim. The court would not have described the class decision as "interlocutory," and cited *Elster*, if it had intended to render a final judgment precluding the claims of all class members who would benefit from reconsideration of certification.

The Supreme Court has repeatedly recognized that relation back applies to all certified Rule 23(b)(3) classes, even where, as here, certification was previously denied, and that denial was affirmed on appeal. In *Eisen* a class was certified long after the statute of limitations had run on the individual members' claims. The court of appeals reversed and that denial of certification was affirmed by the Court. *Eisen*, 417 U.S. at 162-69, 179. In language similar to that used in *Salazar I*, the Court stated that, despite the dismissal of the class, certification of a more manageable sub-class could be considered on remand. *Eisen*, at 179 n.16. If the Court's affirmance of the denial of class certification had stripped certification of its relation-back character, reconsideration would have been pointless, since there would have been no class members with live claims to take advantage of the reconsidered class. The Court obviously contemplated that any class certified on remand would relate back to the original filing of the *Eisen* complaint.

Other circuit courts have also been more consistent in applying the relation back principle. In *Neely v. United States*, 546 F.2d 1059 (3d Cir. 1976), a class action for refund of gambling taxes paid under a statute that had been declared unconstitutional, the Third Circuit, in a manner similar to the opinion in *Salazar I*, invited the district court to reconsider its decision to deny certification. Although it reversed the lower court's decision on the certification issue, it did not order the class certified, but left that decision to the district court on remand. More importantly, the court was explicit with regard to the appropriateness of considering the effect of time preclusion in deciding the certification issue:

> The statute of limitations has now run on future individual filings under the Tucker Act; if a class certification is denied in these proceedings, only the named plaintiff and possibly some intervenors will have the benefit of the relief requested. In this regard, Mr. Justice Black's aphorism may be pertinent: 'Rule 23(b), like the other civil rules, was written to further, not defeat the ends of justice.' *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966).

*Neely*, at 1071. In *Norris v. Frame*, 585 F.2d 1183 (3d Cir. 1978), the same court of appeals suggested to the district court that it might wish to reconsider its denial of certification in order to preserve a claim previously barred by a state statute of limitations. Emphasizing the interlocutory nature of the certification decision, the *Norris* court neither affirmed nor reversed the denial, but merely pointed out that its order could be reconsidered on remand. Similarly, if the decision to affirm the denial in *Salazar I* was truly interlocutory, as it must be under Rule 23(c)(1), then there should be no impediment to an effective, as opposed to a meaningless, reconsideration by the district court on remand.

Relation back also applied to classes certified or ordered to be reconsidered on remand in *Satterwhite v. City of Greenville*, 445 U.S. 940 (1980), *on remand*, 634 F.2d 231 (5th Cir. 1981) (en banc); *Armour v. City of Anniston*, 445 U.S. 940 (1980), *on remand*, 622 F.2d 1226 (5th Cir. 1981); *Walker v. Jim Dandy*, 638 F.2d 1330 (5th Cir. 1981). In all of these cases, remand to reconsider class certification would have been pointless if relation back did not apply, since there would have been no class members with live

claims to benefit from certification. *See also United Airlines v. McDonald*, 432 U.S. 385 (1977).[10]

The policy implications of this Fifth Circuit decision are striking. Denying full relation back effect to the certification decision creates an unnecessary level of uncertainty and doubt in the minds of potential members of any Rule 23(b)(3) class. Class members will never know whether certification of their class will relate back and, thus, will be forced to intervene, or to file their own actions, before limitations expires to avoid preclusion, precisely the ill this Court intended its decisions in *American Pipe* and *McDonald* to cure.

## II. THE COURT OF APPEALS ERRED IN REVERSING THE DISTRICT COURTS' INTERPRETATION OF THE MANDATE WHERE DEFENDANTS DID NOT OBJECT TO THAT INTERPRETATION IN THE DISTRICT COURT OR ON APPEAL

In their complaints, plaintiffs sought actual damages under two complementary causes of action: state law

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[10] In addition to those who responded to the class notices, two other groups of plaintiffs who were awarded damages will be directly affected by the proper application of relation-back effect to the class certification decision: (1) those workers who were not named as parties in any of the complaints but who answered defendants' interrogatories, and (2) those workers who were named parties but who did not answer the interrogatories. When the district court finally decided to certify the classes on remand, that decision was a recognition that class treatment had been appropriate from the beginning of the litigation. Had the classes been certified at the outset, class members would not have been required to respond to interrogatories or to be named as parties in order to recover damages.

contract and violation of the FLCRA requirement that an employer comply with the terms of a work agreement, 7 U.S.C. § 2044(b)(4) (1976). Plaintiffs also sought liquidated damages under FLCRA. Prior to the first trial, Plaintiffs waived their contract and FLCRA actual damage claims in exchange for an agreement that FLCRA liquidated damages could be awarded based on the testimony of "sample" plaintiffs.[11] The plaintiffs and the district court thought that defendants had agreed to this procedure, but the appellate court found otherwise. The court of appeals remanded for a new trial in which all plaintiffs would testify. It also directed the district court to determine "in the first instance" whether plaintiffs had irrevocably waived all claims to actual damages. *Salazar I*, at 1349, n.13. The district court interpreted this mandate as allowing it, in its discretion, to reinstate plaintiffs' actual damage claims under both the contract and FLCRA theories, which it did. The court of appeals now holds, without explanation, that the mandate only allowed the district court to award actual damages under plaintiffs' FLCRA theory, not the contract theory. Defendants did not object to the district court's interpretation of the mandate, either in the district court or on appeal. It was, therefore, error for the court to reverse the district court's interpretation *sua sponte*, especially where the prior mandate gave the trial court broad discretion to reinstate the actual damage claims.

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[11] Plaintiffs entered into this agreement in order to avoid the extraordinary cost of calling all 500 named plaintiffs to testify. They recognized, however, that defendants' agreement was necessary for this procedure to work.

There are strong policy reasons why an allegation that the trial court has misinterpreted the mandate must be raised in the first instance in the district court prior to judgment. To permit otherwise allows the party to accept the interpretation of the mandate by the district court, and then, if the resulting judgment is unfavorable, object to the interpretation on appeal. *See e.g. City of Waco v. Bridges*, 710 F.2d 220, 227-228 (5th Cir. 1983), *cert. denied*, 465 U.S. 1066 (1984) (and cases cited therein). Particularly where, as here, the district court is familiar with the complex facts and procedural history of the case,[12] the court of appeals should not disturb the trial court's reasonable interpretation of the mandate in the absence of the issue being raised by the parties.[13]

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[12] *See Carpa, Inc. v. Ward Foods, Inc.*, 567 F.2d 1316, 1321-22 (5th Cir. 1978) (interpreting prior mandate with reference to "the factual background underlying the decision"); *Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943, 949 (3d Cir. 1985) (district court must implement spirit of mandate taking into account appellate court's opinion and the circumstances it embraces).

[13] Because the district court properly awarded damages under plaintiffs' contract causes of action, the issues relating to attorneys' fees, prejudgment interest, and joint and several liability for the 1978 season damages, all of which are based upon the contract awards, should be remanded for reconsideration by the lower court.

## CONCLUSION

For the reasons set forth herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Weslaco, Texas 78596
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*Attorneys for Petitioners*

## APPENDIX

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8. Exhibit H: Order granting class certification in *Presidio Valley Farmers Ass'n v. Montelongo*, No. P-82-CA-15 (April 18, 1986).....App. 91

9. Exhibit I: Memorandum Opinion and Order in *Salazar v. Presidio Valley Farmers Ass'n*, No. P-81-CA-23, and *Presidio Valley Farmers Ass'n v. Montelongo*, No. P-82-CA-15 (filed June 18, 1987)...App. 94

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**EXHIBIT A**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
PECOS DIVISION

| | | |
|---|---|---|
| AMADO SALAZAR Calderon, et al., Plaintiffs | § | |
| | § | P-81-CA-23 |
| V. | § | |
| PRESIDIO VALLEY FARMERS ASSOCIATION, et al., Defendants | § | |

*LIST OF PLAINTIFFS AND PLAINTIFF CLASS MEMBERS*

Acosta-Martinez, Joaquin
Aguirre de Hernandez, Isabel
Aguirre de Salazar, Emilia
Aguirre-Hernandez, Francisco
Aguirre-Hernandez, Ramon
Aguirre-Hinojos, Guerrero
Aguirre-Leyva, Jesus
Aguirre-Primero, Carmen
Aguirre-Primero, Maria
Alvarado-Gonzales, Miguel
Amador-Galindo, Alfonso
Amador-Galindo, Benito
Amancio, Roberto
Amancio-Garcia, Federico
Amaya-Gallegos, Juan de Dios
Anaya-Aguilar, Isabel
Anaya-Jasso, Librado
Anaya-Terrazas, Luis
Angel-Ramirez, Jose
Aragonez-Castillo, Ernesto
Araluz-Hernandez, Victor
Aranda-Tabarez, Jose
Arenibas-Olivas, Abelardo
Arenivas-Alvarado, Jesus
Arenivas-Marrufo, Apolonio
Arenivas-Marrufo, Ramon
Arenivas-Olivas, Alfredo
Armendariz de Ortiz, Manuela
Arredondo-Rangel, Nasario
Arredondo-Rangel, Valente
Arroyo-Sanchez, Isabel
Astorga-Zuniga, Eusebio
Astorga-Zuniga, Ma. de la Luz
Avila-Lara, Jesus
Baca-Carabeo, Frutoso
Baca-Carabeo, Petronilo
Baeza de Enriquez, Otilia
Baeza-Hernandez, Anita
Baeza-Hernandez, Victoria
Baeza-Martinez, Manuel
Baeza-Ortega, Lazaro
Baeza-Ortega, Manuel

Baeza-Reyes, Benito
Baeza-Villanueva, Ramon
Bailon-Gonzalez, Fermin
Bailon-Navarette, Simon
Bailon-Nieto, Carlos
Balderas-Uranga, Dulces Nombre
Bautista-Garcia, Timoteo
Bonilla-Hernandez, Ruben
Borjon-Amaro, Fidel
Borjon-Lujan, Jose Antonio
Borjon-Lujan, Mario
Brito-Villa, Benjamin
Brito-Villa, Erasmo
Brito-Zuniga, Leonel
Bueno-Valdez, Hector
Bueno-Valdez, Manuel
Bustamante-Marquez, Jesus
Bustamente-Barrientos, Guadal.
Cabello-Perez, Francisco
Cabrera-Lopez, Maximino
Calderon-Franco, Nestor
Calderon-Franco, Pedro
Calderon-Mena, Roberto
Calderon-Mendoza, Fidel
Calderon-Valenzuela, Alfredo
Carrasco-Galindo, Jose Ignacio
Carrasco-Lujan, Meliton
Carrasco-Orona, Luis
Carrasco-Orona, Pedro
Carrasco-Padilla, Oscar
Carreon-Guerrero, Margarito
Carrillo-Coronado, Isabel
Carrillo-Valenzuela, Bivian
Celis-Arriola, Guadalupe
Chacon-Escudero, Angel
Chacon-Munoz, Alfredo
Chavez-Chaparro, Blas
Chavez-Chaparro, Juan
Chavez-Chavez, Alejandro
Chavez-Lujan, Carlos
Chavez-Portillo, Apolinar
Chavez-Yanez, Rosario
Chavira de Primero, Antonia
Contreras, Jesus Manuel
Contreras-Cruz, Mario
Contreras-Valles, Alfredo
Contrerras-Rodriguez, Ruben
Corral-Madrid, Antonia
Corrales, Adelino
Corrales, Manuel
Corrales-Villalobos, Felix
Corrales-Villalobos, Pedro
Cortez-Ibarra, Pablo
Cortez-Leyva, Manuel
Cortez-Lujan, Natividad
Cortez-Marquez, Severo
Cortez-Martinez, Monico
Cortez-Oliva, Benito
Cruz-Arrevalo, Pedro
Cruz-Hernandez, Victor
De La O Cortez, Andres
De La O-Castillo, Ulises
De La O-Cortez, Jorge
Dela Luz Piedra-Martinez, Mari
Diaz-Padilla, Antonio
Dominguez-Levario, Trinidad
Dominguez-Madrid, Matias
Dominguez-Rubio, Ruben
Enriquez, Bartolo
Enriquez, Estela
Escarcega-Rodriguez, Antonio

Estrada-Mata, Felipe
Estrella-Olivas, Jorge Luis
Estrella-Olivas, Pablo
Fabela-Contreras, Paz
Falcon-Mejia, Ramon
Fierro-Perez, Jesus
Fierro-Rodriguez, Ramon
Flores-Mora, Enrique
Flotte-Chavez, Valentin
Franco-Nunez, Ramon
Gabaldon-Bailon, Remedios
Gabalon-Quinones, Francisco
Galindo, Francisco
Galindo-Baeza, Guillermo
Galindo-Bustos, Roberto
Galindo-Carrasco, Crispin
Galindo-Carrasco, Guillermo
Galindo-Hernandez, Baldemar
Galindo-Hernandez, Francisco
Galindo-Hernandez, Hilario
Galindo-Licon, Agapito
Galindo-Lujan, Daniel
Galindo-Lujan, Elias
Galindo-Lujan, Isaias
Galindo-Lujan, Jose Saul
Galindo-Manriquez, Victoriano
Galindo-Vela, Antonio
Gallegos-Amaya, Socorro
Gallegos-Diaz, Socorro
Gallegos-Molina, Jesus
Gallegos-Urias, Hipolito
Gallegos-Urias, Librada
Gamboa-Gamboa, Alfredo
Garcia de Anda, Maria
Garcia, Anita
Garcia-Belmontes, Jesus
Garcia-Belmontes, Jose
Garcia-Belmontes, Jose G.
Garcia-Chavez, Joaquin
Garcia-Contreras, Jesus
Garcia-Martinez, Jose Mersed
Garcia-Ordonez, Juan
Garcia-Perez, Rosa Elva
Garcia-Ramos, Cruz
Garcia-Sanchez, Juan Samuel
Gardea-Jimenez, Blas
Gardea-Jimenez, Candelaria
Gardea-Ruiz, Alfredo
Gardea-Ruiz, Angela
Gardea-Ruiz, Guadalupe
Gardea-Ruiz, Jaime
Gomez-Baeza, Patricio
Gomez-Olivas, Carlos
Gomez-Soto, Ismael
Gomez-Soto, Jesus
Gonzales, Luz Mila
Gonzales-Bustamante, Emeterio
Gonzales-Pando, Manuel
Gonzalez, Sixto
Gonzalez-Garcia, Lorenzo
Gonzalez-Hernandez, Manuel
Gonzalez-Moreno, Jesus
Gonzalez-Perez, Pilar
Gonzalez-Rivera, Armando
Gonzalez-Saldana, Andres
Grado-Leyva, Armando
Grado-Leyva, Ausires
Grado-Leyva, Herminio
Guevara-Escudero, Guadalupe
Gutierrez de Jasso, Manuela

Gutierrez, Jose
Gutierrez, Jose (2)
Gutierrez-Carrera, Nicolas
Gutierrez-Fragoso, Severiano
Guzman-Astorga, Amadina
Guzman-Martinez, Francisco
Guzman-Urquizo, Jose Manuel
Guzman-Urquizo, Ramon
Guzman-Villescas, Emilio
Heredia-Baeza, Jose
Hernandez, Agustin
Hernandez, Carlos Manuel
Hernandez, Julian
Hernandez-Arenivas, Eusebio
Hernandez-Arenivas, Juan
Hernandez-Armendarez, Andres
Hernandez-Armendariz, Gilberto
Hernandez-Armendariz, Ramon
Hernandez-Armendariz, Raul
Hernandez-Carrasco, Maximo
Hernandez-Carrillo, Jose
Hernandez-Corrales, Blanca E.
Hernandez-Cortez, Guadalupe
Hernandez-Cortez, Octavio
Hernandez-Escontrias, Guadalup
Hernandez-Galindo, Reyes
Hernandez-Leyva, Margarito
Hernandez-Lujan, Jose
Hernandez-Lujan, Miguel
Hernandez-Madrio, Epigmenio
Hernandez-Saenz, Manuel
Hernandez-Tercero, Adan
Hernandez-Tercero, Eustreberto
Hernandez-Valenzuela, Sergio
Herrera-Carreon, Patricio
Herrera-Gonzalez, Leon
Hinojos-Fabela, Severiano
Hinojos-Morales, Pedro
Hinojos-Quinones, Jorge
Hinojos-Quinonez, Severiano
Hinojos-Quinos, Patricio
Hinojos-Rey, Ezequiel
Hinojos-Rey, Magdalena
Hinojos-Rey, Matias
Hinojos-Rey, Refugio
Hinojos-Sanchez, Victorino
Huerta-Ruiz, Manuela
Humberto-Leyva, Jose
Jacques-Martinez, Casimiro
Jasso-Ramirez, Martin
Juarez de Gardea, Rosa Elda
Juarez, Victor Manuel
Juarez-Carrasco, Ramiro
Juarez-Gonzalez, Alberto
Juarez-Mendoza, Pedro
Lara-Sanchez, Carmen
Lara-Vargas, Melquiades
Leon-Leon, Jose
Levario-Corrales, Humberto
Levario-Juarez, Julian
Leyva-Arevalo, Sotero
Leyva-Gonzalez, Rafael Martin

Leyva-Guevara, Federico
Leyva-Guevara, Wilfredo
Leyva-Hernandez, Abel
Leyva-Hernandez, Armando
Leyva-Hernandez, Cayetano
Leyva-Hernandez, Dario
Leyva-Hernandez, Jesus
Leyva-Hernandez, Julian
Leyva-Mancha, Romulo
Licon-Galindo, Dionisio
Lujan-Galindo, Martin
Lujan-Galindo, Valente
Lujan-Hernandez, Crisoforo
Lujan-Hernandez, Jesus
Lujan-Hernandez, Ruben
Lujan-Martinez, Pablo
Lujan-Pando, Jose Neri
Lujan-Rios, Matilde
Luna de la Rosa, David
Madrid de la O, Magdaleno
Madrid-de la O, Guadalupe
Madrid-Gamboa, Carlos
Madrid-Garcia, Javier
Madrid-Lujan, Hector
Madrid-Tercero, Andres
Madrid-Tercero, Gumercindo
Magallanes, Pedro
Marquez-Sais, Silvestre
Martinez, Tomasa
Martinez-Ochoa, Lucio
Martinez-Olivas, Catarino
Martinez-Ortega, Domingo
Martinez-Rodriguez, Eduardo
Martinez-Salazar, Anastacio
Martinez-Villa, Pedro
Mata-Lujan, Froilan
Mata-Lujan, Luis
Mata-Zamora, Ramon
Medrano, Calixtro
Medrano-Terrazas, Camelino
Mendoza-Escontrias, Adan
Miranda-Serrano, Martin
Monarrez-Hinojos, Ma. de los A
Monarrez-Martinez, Octaviano
Montes-Carrasco, Erbey
Mora-Carrillo, Jose Maria
Mora-Lopez, Jose Maria
Morales-Hernandez, Porfirio
Morales-Rodriguez, Eli
Morales-Urquidi, Tomas
Moreno-Montes, Sabino
Munoz-Ramirez, Arturo
Natera-Ramirez, Octavio
Nieto-Mendoza, Armando
Nieto-Olivas, Saturnino
Nieto-Quinonez, Cruz
Nieto-Veliz, Anselmo
Nunez, Maurilio
Nunez-Rayos, Raul
Ochoa-Gonzalez, Cruz
Olivas-Chavez, Ramon
Olivas-Contreras, Pilar
Olivas-Fernandez, Manuel
Olivas-Rodriguez, Marcelino
Olivas-Rodriguez, Matilde
Olivas-Sanchez, Hector
Olivas-Terrazas, Luis
Ontiveros-Lona, Francisco
Orona-Hinojos, Gabriel
Ortega-Morales, Carlos

Ortega-Ortega, Alfredo
Ortiz, Lazaro
Ortiz-Olivas, Jesus
Ortiz-Olivas, Joaquin
Ortiz-Ramirez, Priciliano
Ovalle-Valles, Leonardo
Padilla-Lopez, Fernando
Padron-Marquez, Conrado
Palacios-Torres, Cruz
Palacios-Torres, Guerrero
Palacios-Torres, Ignacio
Palomino-Lozano, Maria de la P
Palomino-Valle, Gonzalo
Pantoja-Carrasco, Arnulfo
Pantoja-Carrasco, Oscar
Pantoja-Guevarra, Francisco
Peregrino-Martinez, Benjamin
Peregrino-Martinez, Eleazar
Peregrino-Martinez, Luis
Peregrino-Martinez, Pedro
Perez, Rosario
Perez-Fierro, Armando
Perez-Fierro, Dulces Nombres
Perez-Fierro, Ramon
Perez-Ramirez, Ramon
Pina-Prueno, Florentino
Pompa-Pompa, Jose Luis
Primero-Aguirre, Guillermina
Primero-Arteaga, Adelaido
Primero-Corral, Maria
Primero-Franco, Victoriano
Ramirez-Botello, Francisco A.
Ramirez-Gonzalez, Jose
Ramirez-Machuca, Baldomero
Ramirez-Ortega, Armando
Ramos-Fierro, Gregorio
Rangel, Simon
Rey-Urquidi, Alberto
Reyes-Olivas, Merced
Rios-Morales, Jose
Rivas-Gardea, Baudilio
Rocha-Gutierrez, Arturo
Rodriguez-Castillo, Carlos
Rodriguez-Fierro, Jesus
Rodriguez-Fierro, Manuel
Rodriguez-Lopez, Jesus Javier
Rodriguez-Moreno, Jesus
Rodriguez-Ortega, Eduviges
Rodriguez-Rodriguez, Israel
Rodriguez-Roman, Jose
Rodriguez-Romero, Berta
Rodriguez-Salazar, Eleazar
Rodriguez-Soto, David
Rodriguez-Torres, Antonio
Rodriguez-Torres, Jacinto
Rodriguez-Vasquez, Maximo
Rodriguez-Venega, Edelmira
Roman-Franco, Pedro
Roman-Solis, Rosario
Romero-Ruiz, Jose
Rubio-Baeza, Juan
Ruiz de Gardea, Genoveva
Saenz-Bustamante, Raul
Saenz-Correa, Benito
Saenz-Gonzalez, Abelardo
Saenz-Martinez, Jose
Saenz-Sigala, Daniel
Salazar-Aranda, Jose
Salazar-Calderon, Amado
Salazar-Calderon, Antonio

Salazar-Calderon, Jesus
Salazar-Hurtado, Amado
Salazar-Hurtado, Rafael
Salazar-Martinez, Roberto
Sanchez-Lujan, Leopoldo
Sanchez-Pando, Salvador
Sanchez-Sanchez, Guadalupe
Sanchez-Valenzuela, Armando
Serrano-Rodriguez, Gregorio
Serrano-Rodriguez, Ramon
Serrano-Rodriguez, Reyes
Sigala-Madrid, Eduviges
Sigala-Porras, Andres
Soto-Gardea, Manuel
Soto-Orona, Manuel
Soto-Perez, Cecilio
Subia-Sanchez, Guadalupe
Suchil-Galindo, Juan
Tabares-Carrasco, Ruben
Tabares-Leyva, Librado
Tarango-Rodriguez, Jose de Luz
Tavares-Carrasco, Eugenio
Tavares-Hernandez, Austreberto
Tavares-Hernandez, Cosme
Tavares-Hinojosa, Evangelina
Tavarez-Carrasco, Alfonso
Tavarez-Carrasco, Crisantos
Tavarez-Carrasco, Reyes
Tavarez-Hernandez, Efren
Tercero-Dominguez, Pedro
Tercero-Dominguez, Ramon
Tercero-Galindo, Gilberto
Tercero-Hernandez, Antonio
Tercero-Hernandez, Feliciana
Tercero-Hernandez, Santiago
Tercero-Leyva, Isael
Terrazas-Medrano, Eduardo
Terrazas-Vasquez, Pedro
Torres-Arranda, Jose
Torres-Dominguez, Leovigildo
Torres-Dominguez, Lusiano
Torres-Navarette, Braulio
Torres-Navarette, Gilberto
Torres-Navarrete, Ponciano
Torres-Torres, Tomas
Uranga-Galindo, Librado
Uranga-Leyva, Manuel
Urias-Nieto, Andres
Urias-Nieto, Jesus Adrian
Urias-Nieto, Jose Javier
Urias-Nieto, Regino
Urquidi de Marquez, Bertha
Urquidis-Gomez, Antonio
Vaca-Silvas, Juan
Valdez-Alvarado, Guadalupe
Valenzuela-Olivas, Rodolfo
Vallez-Borrunda, Jose
Vasquez-Martinez, Tomas
Vasquez-Mata, Teodoso
Villalobos-Garcia, Enrique
Villalobos-Herrera, Aurelio
Villalobos-Herrera, Otilio
Villescas-Primero, Antonio
Villescas-Primero, Francisco
Zubiate-Coquel, Pedro
Zubiate-Lares, Alfredo
Zuniga-Tarin, Esteban

**EXHIBIT B**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
PECOS DIVISION

| | | |
|---|---|---|
| PRESIDIO VALLEY FARMERS ASSOCIATION, et al., Plaintiffs-Counter-claim Defendants | § | P-82-CA-15 |
| VS. | § | |
| ANTONIO MONTELONGO, et al., Defendants-Counter-claim Plaintiffs | § | |

*LIST OF PLAINTIFFS AND PLAINTIFF CLASS MEMBERS*

Adame-Mancha, Magadaleno
Aguirre de Hernandez, Isabel
Aguirre de Salazar, Emilia
Aguirre-Acosta, Carmen
Aguirre-Hernandez, Francisco
Aguirre-Hernandez, Ramon
Aguirre-Hinojos, Guerrero
Amancio-Garcia, Federico
Anaya-Jasso, Librado
Anaya-Terrazas, Luis
Araluz-Hernandez, Victor
Aranda-Tabarez, Jose
Arenivas-Alvarado, Jesus
Arenivas-Marrufo, Apolonio
Arredondo-Rangel, Nasario
Arroyo-Sanchez, Isabel
Astorga-Zuniga, Eusebio
Baca-Carabello, Encarnacion
Baeza-Hernandez, Anita
Baeza-Hernandez, Victoria
Baeza-Martinez, Manuel
Baeza-Reyes, Benito
Baeza-Villanueva, Ramon
Bailon-Gonzalez, Fermin
Balderas-Hernandez, Jose Marc.
Balderas-Uranga, Dulces Nombre
Borjon-Amaro, Fidel
Borjon-Lujan, Jose Antonio
Borjon-Lujan, Mario
Brito-Villa, Benjamin
Brito-Zuniga, Leonel
Bueno-Valdez, Hector
Bustamante, Margarita
Bustamente-Barrientos, Guadal.
Cabello-Perez, Francisco

Calderon-Franco, Pedro
Calderon-Valenzuela, Alfredo
Calderon-Valenzuela, Francisco
Carrasco-Galindo, Jose Ignacio
Carrasco-Lujan, Meliton
Carrasco-Orona, Luis
Carrasco-Orona, Pedro
Carreon-Guerrero, Margarito
Carrillo-Valenzuela, Bivian
Castro-Rubio, Rudolfo
Celis-Arriola, Guadalupe
Chavez-Chaparro, Juan
Chavez-Chavez, Alejandro
Chavez-Lujan, Carlos
Chavira de Primero, Antonia
Chavira-Gutierrez, Ignacio
Contreras, Jesus Manuel
Contreras, Mario
Contreras-Valles, Alfredo
Corral de Rodriguez, Monserrat
Corral-Rodriguez, Socorro
Cortez-Ibarra, Pablo
Cortez-Leyva, Manuel
Cortez-Lujan, Natividad
Cortez-Marquez, Severo
Cruz-Garcia, Andres
Dominguez-Levario, Trinidad
Dominguez-Rubio, Ruben
Enriquez, Bartolo
Escarcega-Rodriguez, Antonio
Estrella-Olivas, Jaime
Estrella-Olivas, Jorge Luis
Estrella-Olivas, Pablo
Fiero-Rodriguez, Benito
Fierro-Rodriguez, Ramon
Flotte-Chavez, Valentin
Franco-Nunez, Ramon
Galindo-Bustos, Roberto
Galindo-Hernandez, Francisco
Galindo-Hernandez, Hilario
Galindo-Licon, Agapito
Galindo-Lujan, Daniel
Galindo-Lujan, Elias
Galindo-Lujan, Isaias
Galindo-Padilla, Alberto
Gallegos-Diaz, Maria de Jesus
Gallegos-Diaz, Socorro
Gallegos-Urias, Hipolito
Gamboa-Gamboa, Alfredo
Garcia-Belmontes, Jesus
Garcia-Contreras, Jesus
Garcia-Martinez, Jose Mersed
Garcia-Ramos, Cruz
Gardea-Ruiz, Alfredo
Gardea-Ruiz, Carlos
Gardea-Ruiz, Jaime
Gomez-Baeza, Patricio
Gomez-Soto, Jesus
Gonzales-Bustamante, Emeterio
Gonzalez, Sixto
Gonzalez-Saldana, Andres
Gutierrez de Jasso, Manuela
Gutierrez, Jose
Guzman-Martinez, Francisco
Heredia-Baeza, Jose
Hernandez, Carlos Manuel
Hernandez, Victor Cruz

Hernandez-Arenivas, Eusebio
Hernandez-Arenivas, Juan
Hernandez-Armendariz, Raul
Hernandez-Corrales, Blanca E.
Hernandez-Galindo, Reyes
Hernandez-Lujan, Ignacio
Hernandez-Lujan, Miguel
Hernandez-Rangel, Paulino
Hernandez-Tercero, Adan
Hernandez-Valenzuela, Sergio
Herrera-Carreon, Patricio
Herrera-Gonzalez, Leon
Hinojos-Quinones, Patricio
Hinojos-Rey, Matias
Holguin-Zepulveda, Gilberto
Huerta-Ruiz, Manuela
Jacques-Martinez, Casimiro
Jasso-Ramirez, Martin
Juarez de Gardea, Rosa Elda
Juarez, Victor Manuel
Lara-Sanchez, Carmen
Lara-Vargas, Melquiades
Levario-Corrales, Humberto
Levario-Juarez, Julian
Leyva-Arevalo, Sotero
Leyva-Hernandez, Julian
Leyva-Mancha, Romulo
Lujan-Galindo, Martin
Lujan-Hernandez, Jesus
Lujan-Rios, Matilde
Madrid de la O, Magdaleno
Madrid, Jose Angel III
Madrid-de la O, Guadalupe
Madrid-Tercero, Gumercindo
Martinez-Nevarez, Carmen
Martinez-Ortega, Domingo
Martinez-Villa, Pedro
Mata-Lujan, Froilan
Mata-Lujan, Luis
Medrano, Calixtro
Medrano-Terrazas, Camelino
Monarrez-Martinez, Octaviano
Monje-Martinez, Ricarte
Montes-Carrasco, Erbey
Natera-Ramirez, Octavio
Nieto-Mendoza, Armando
Nieto-Olivas, Saturnino
Nieto-Quinonez, Cruz
Nieto-Veliz, Anselmo
Nieves-Martinez, Jose
Olivas-Fernandez, Manuel
Olivas-Porras, Antonio
Olivas-Ramirez, Antonio
Olivas-Rodriguez, Marcelino
Ontiveros-Lona, Francisco
Ortiz-Ramirez, Priciliano
Padron-Marquez, Conrado
Palacios-Torres, Cruz
Palacios-Torres, Guerrero
Palacios-Torres, Ignacio
Palomino-Valle, Gonzalo
Pantoja, Oscar
Pantoja-Carrasco, Arnulfo
Pantoja-Guevarra, Francisco
Peregrino-Martinez, Benjamin
Peregrino-Martinez, Eleazar
Peregrino-Martinez, Elida
Peregrino-Martinez, Luis

Peregrino-Martinez, Pedro
Perez-Rivas, Francisco
Pina-Prueno, Florentino
Primero-Aguirre, Guillermina
Primero-Arteaga, Adelaido
Primero-Arteaga, Eulogio
Primero-Arteaga, Norberto
Primero-Chavira, Jose Luis
Primero-Corral, Maria
Ramirez-Gonzalez, Vicente
Ramos-Fierro, Aurelio
Rangel-Fierro, Zimon
Reyes-Olivas, Merced
Rivas-Gardea, Baudilio
Rodriguez-Morales, Juan
Rodriguez-Roman, Jose
Rodriguez-Romero, Berta
Rodriguez-Salazar, Eleazar
Rodriguez-Torres, Antonio
Roman-Franco, Pedro
Roman-Solis, Rosario
Rubio-Baeza, Juan
Ruiz de Gardea, Genoveva
Saenz-Bustamante, Raul
Saenz-Ruiz, Lino
Salazar-Calderon, Jesus
Salazar-Hurtado, Alfredo
Salazar-Martinez, Roberto
Sanchez-Lujan, Leopoldo
Sanchez-Pando, Salvador
Sigala-Porras, Andres
Soto-Perez, Cecilio
Tabares-Leyva, Librado
Tarango-Rodriguez, Jose de Luz
Tavares-Carrasco, Carmen
Tavares-Carrasco, Eugenio
Tavares-Hernandez, Austreberto
Tavarez-Carrasco, Alfonso
Tavarez-Carrasco, Reyes
Tercero-Galindo, Gilberto
Tercero-Hernandez, Antonio
Tercero-Hernandez, Santiago
Tercero-Leyva, Isael
Terrazas-Vasquez, Pedro
Torres-Arranda, Jose
Torres-Dominguez, Leovigildo
Torres-Navarette, Gilberto
Urquidi de Marquez, Bertha
Vaca-Silvas, Juan
Valdez-Alvarado, Guadalupe
Valles-Borunda, Jose
Vasquez-Mata, Teodoso
Zubiate-Coquel, Pedro
Zuniga-Tarin, Esteban

EXHIBIT C

863 F.2d 384

Amado SALAZAR CALDERON, et al.,
Plaintiffs-Appellees,
Cross-Appellants,

v.

PRESIDIO VALLEY FARMERS ASSOCIATION, et al.,
Defendants-Appellants, Cross-Appellees.

PRESIDIO VALLEY FARMERS ASSOCIATION,
Plaintiff-Appellant, Cross-Appellee,

v.

Antonio MONTELONGO, et al.,
Intervenors-Defendants,
Appellees-Cross-Appellants.

Amado SALAZAR CALDERON, et al.,
Plaintiffs-Appellants,

v.

PRESIDIO VALLEY FARMERS ASSOCIATION, et al.,
Defendants-Appellees.

PRESIDIO VALLEY FARMERS ASSOCIATION,
Plaintiff-Counter Claim
Defendant-Appellee,

v.

Ray MARSHALL, Etc., et al., Defendants,

Antonio Montelongo, et al.,
Intervenors-Defendants and Counter Claim
Plaintiffs-Appellants.

Nos. 87-1512, 87-1513 and 87-1701.

United States Court of Appeals, Fifth Circuit.

Jan 20, 1989.

Several hundred Mexican farm workers sued growers' association and grower members for breach of

their employment agreement and for numerous violations of the Farm Labor Contractor Registration Act which occurred during the 1977 harvest season. In second action, farm workers asserted same claims for the 1978 harvest season. The United States District Court for the Western District of Texas, Lucius Desha Bunton, III, Chief Judge, entered judgment in favor of workers in both actions. Plaintiffs appealed and defendants cross-appealed. The Court of Appeals, 765 F.2d 1334 and 765 F.2d 1353, affirmed in part, reversed in part, vacated in part, and remanded. On remand, the District Court consolidated the two cases and reconsidered an earlier class action decision, certifying a class of workers. After hearing testimony from class members, workers were awarded actual damages for breach of the "working arrangement." The District Court also awarded attorney fees to the workers. Both sides appealed. The Court of Appeals held that: (1) district court's holding that association was liable under state law for breach of contract reached beyond original mandate, and would be reversed; (2) award of attorney fees was not authorized under the FLCRA; and (3) allowing both actual and liquidated damages for distinct violations of the Act did not constitute a double recovery.

Affirmed in part and reversed in part.

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Thomas J. Bacas, Washington, D.C., Presidio Valley Farms Ass'n, et al.

Edward J. Tuddenham, Washington, D.C., David Hall, Texas Rural Legal Aid, Inc., Weslaco, Tex., for Calderon, et al. and Antonio Montelongo, et al.

Appeals from the United States District Court for the Western District of Texas.

Before GOLDBERG,
HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:

Several hundred Mexican farmworkers sued the Presidio Valley Farmers Association and its grower members for breach of their employment agreement and numerous violations of the Farm Labor Contractor Registration Act. The PVFA had hired the workers during the 1977 and 1978 harvest seasons pursuant to "H-2" temporary visas issued by the Immigration and Naturalization Service. The district court entered judgment in favor of the workers, and both sides appealed.

In *Salazar-Calderon v. Presidio Valley Farmers Association*, 765 F.2d 1334 (5th Cir.1985), *cert. denied*, 475 U.S. 1035, 106 S.Ct. 1245, 89 L.Ed.2d 353 (1986), we affirmed liquidated damages against PVFA and its members, jointly and severally, in the amount of $15 per worker for each of five "technical" FLCRA violations that occurred during the 1977 harvest. However, we vacated the court's $300 liquidated damages award to piece rate workers for a sixth FLCRA violation, "failure to abide by the working arrangement." We remanded the case for a new damages trial on that issue because (1) the trial court omitted from its liability findings and damage award several alleged violations, and provided no explanation for limiting the

award to piece rate workers; (2) the trial court had erroneously excluded from the working agreement's terms a weekly transportation allowance, and a guarantee of work or pay for at least three-quarters of the visa period; and (3) the PVFA had not agreed to the district court's procedure for determining these damages.

In *Presidio Valley Farmers Association v. Brock*, 765 F.2d 1353 (5th Cir.1985), *cert. denied*, 474 U.S. 1073, 106 S.Ct. 833, 88 L.Ed.2d 804 (1986), now on appeal as *Montelongo*, we adopted the same rulings for FLCRA violations during the 1978 harvest, except that PVFA members were not jointly and severally liable because PVFA had incorporated that year.

On remand, the district court consolidated the two cases and reconsidered its earlier class action decision, certifying a class of H-2 workers pursuant to Fed.R.Civ.P. 23(b)(3). After hearing testimony from 507 class members, the court awarded the workers in *Salazar* and *Brock* $705,710.53 and $333,718, respectively, in actual damages for breach of the "working arrangement." The court also awarded $176,323 and $40,028.50, respectively, in attorneys' fees.

Both sides now appeal. PVFA challenges the trial court's award of actual damages and contends that they were erroneously calculated. PVFA also contends that the court erroneously held the growers jointly and severally liable for PVFA's FLCRA violations during the 1978 harvest. Finally, PVFA argues that the trial court erred by certifying the class action on remand and by awarding attorneys' fees. The workers urge that the court erred by denying prejudgment interest on damages for breach of

the working agreement, denying damages to particular class members, and by failing to include recovery for paralegal and travel time in determining attorneys' fees. For reasons stated below, we affirm in part and reverse in part.

I

We turn first to the holding that PVFA is liable under state law for breach of contract. We originally vacated the trial court's damage award for a sixth FLCRA violation, "failure to abide by the working arrangement." We remanded the case to allow the district court to redetermine damages for that FLCRA violation in light of "additional terms" that we found were part of the work agreement. *Salazar*, 765 F.2d at 1353; *Brock*, 765 F.2d at 1353; *Brock*, 765 F.2d at 1357. We did not reopen the legal theory involved. Yet on remand, the district court found PVFA liable under a legal theory not urged in the original appeals, breach of state law contract. This finding reaches beyond our original mandate, and we reverse the district court's findings insofar as they are based on a state law breach of contract theory. *See Stamper v. Baskerville*, 724 F.2d 1106, 1107-1108 (4th Cir.1984) (trial court may decide matters left open on remand only insofar as they are consistent with appellate court's mandate).

A. JOINT & SEVERAL LIABILITY

PVFA attacks the trial court holding that its members are jointly and severally liable for PVFA's violation of the work agreement during the 1978 harvest. The district court acknowledged our previous holding that PVFA's

members were not jointly and severally liable for PVFA's FLCRA violations during the 1978 harvest. *See Brock*, 765 F.2d at 1359. The court found, however, that as joint employers PVFA's members could be held jointly and severally liable for breach of state law contract, a theory not available to it, as we have explained. Workers' counsel conceded during oral argument that PVFA's members could not be held jointly and severally liable for PVFA's FLCRA violations because PVFA had incorporated during that year. We must then reverse the court's finding that PVFA's members are jointly and severally liable for PVFA's violation of the work agreement during the 1978 harvest.

PVFA also claims that the district court erred in holding the growers individually liable for liquidated damages previously assessed against PVFA for five "technical" FLCRA violations during the 1978 season. Apparently, this assessment was not intended by the district court.[1] The workers concede this error in their brief and voice no objection to a modification of the judgment. Accordingly, we modify the district court's decision to reflect that PVFA's members are not individually liable for liquidated damages resulting from PVFA's five "technical" FLCRA violations during the 1978 season.

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[1] While the district court's judgment held PVFA members individually liable for PVFA's 1978 FLCRA violations, the court made clear in its opinion that it only intended to award "the liquidated damage award affirmed by the Fifth Circuit. . . ."

## B. ATTORNEYS' FEES

PVFA next argues that the trial court erroneously awarded attorney's fees under Tex.Civ.Prac. & Rem.Code §§ 38.-001-006 (Vernon 1986) for a case based on federal law. The FLCRA does not itself authorize an award of attorneys' fees. *Montelongo v. Meese*, 803 F.2d 1341, 1355 n. 23 (5th Cir.1986); *Alvarez v. Longboy*, 697 F.2d 1333, 1340-41 (9th Cir.1983). Workers' counsel conceded at oral argument that their claim to attorneys' fees rested solely upon state law.[2] Because this case is based entirely upon FLCRA, we vacate the district court's award of attorneys' fees in both cases.[3]

# II

We next address claims relating to the district court's damage award on remand.

## A. ACTUAL DAMAGES

PVFA contends that the district court erred in awarding actual damages for breach of the work agreement on grounds that (1) the FLCRA precludes an award of both

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[2] Federal courts may award attorneys' fees to a prevailing party, even in the absence of a statutory provision, where the losing party has acted in "bad faith." *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 258-59, 95 S.Ct. 1612, 1622, 44 L.Ed.2d 141 (1975). The record in the instant case does not support such a finding and the workers make no such claim on appeal.

[3] Accordingly, we do not reach the workers' claim that the trial court erroneously excluded paralegal and travel time from the attorneys' fees awarded them.

liquidated and actual damages; (2) the record does not support the trial court's conclusion that the workers' waiver of actual damages during the first trial was "conditional"; and (3) the workers failed to answer PVFA's interrogatories on actual damages. We reject all three arguments.

First, PVFA argues that the trial court could not award actual damages for a sixth FLCRA violation because it had earlier awarded liquidated damages for five separate violations. PVFA claims that an award for actual damages for breach of the work agreement would constitute double recovery. The workers respond that FLCRA merely prohibits recovery of actual and liquidated damages for the same violation.

The statute at issue, 7 U.S.C. § 2050a(b) (repealed 1982), provides that:

> If the court finds that the respondent has intentionally violated any provision of this chapter or any regulation proscribed hereunder, it may award damages up to and including an amount equal to the amount of actual damages, or $500 for each violation, or other equitable relief.

While the plain language of the statute makes clear that FLCRA prohibits recovery of actual and liquidated damages for the same violation, neither party cites relevant cases or legislative history that would resolve the issue as to whether the statute prohibits recovery of liquidated damages for some FLCRA violations and actual damages for other, distinct FLCRA violations.

We reject PVFA's interpretation of the statute and its argument that allowing both actual and liquidated damages for distinct FLCRA violations constitutes double

recovery. The "harm" caused by the five "technical" FLCRA violations, which involved PVFA's failure to process paperwork, bears no relation to the harm that resulted from the sixth FLCRA violation, that the farmers underpaid their workers in violation of the work agreement.[4]

PVFA next urges us to reject actual damages on grounds that the workers waived them at the first trial. On the first appeal, we observed that the workers waived actual damages for breach of the work agreement only after the district court excluded the "core of the plaintiffs' contractual claims" from the terms of the agreement. *Salazar,* 765 F.2d at 1348 & n. 9. Concluding that these terms were erroneously excluded from the agreement, we left the waiver issue for the district court to decide on remand. *Id.* at 1349 & n. 13. On remand, the district court concluded that the workers had "conditioned" their 1984 waiver of actual damages on the defendants' acceptance of a simplified damages proceeding.[5] The court adopted this procedure in calculating its liquidated damage award

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[4] Defendants do not contend that the $300 liquidated damages award for breach of the work agreement constitutes double recovery and provide no explanation of how the trial court's substitute of actual damages for liquidated damages transforms the award into double recovery.

[5] The workers proposed that the court determine liquidated damages from plaintiffs' answers to defendants' interrogatories and testimony from only a sample of "representative" workers to determine employment conditions considered common to all. *Salazar,* 765 F.2d at 1348.

at the first trial, but the defendants later attacked the procedure on appeal on grounds that they had not consented to try damages in that manner. *Id.* at 1349. Accordingly, the district court ruled on remand that "Plaintiffs' waiver was of no consequence" because it was a "conditional waiver."

We need not decide whether the record supports the trial court's finding that the workers' waiver of actual damages was conditional. In remanding the case to the district court to consider terms erroneously excluded from the work agreement, we stated:

> The district court should first address the defendants' argument that plaintiffs have waived their rights to actual damages. If there has been such a waiver, the court may nevertheless find it appropriate to vacate its liquidated damages award for the violations of the work agreement and reassess liability and damages in light of these additional terms.

*Salazar*, 765 F.2d at 1353 n. 18.

On remand, the court cited our instruction and concluded that because additional terms had been included in the work agreement, the prior liquidated damages award must be vacated and actual damages determined. We affirm the district court's equitable discretion to award actual damages in light of these newly included terms.

Finally, PVFA contends that even if the workers' claims for actual damages were reinstated, the workers waived those claims when they failed to respond to an interrogatory asking each worker to specify their actual damages and how they were calculated. The workers respond that they delivered proof of claim forms and a

computer printout specifying the damages and calculations for each worker. PVFA counters that the printouts did not comply with Fed.R.Civ.P. 33(a) because they were not answered separately in writing under oath and were not signed.

We find that PVFA has waived any claim of defect in the workers' response to its interrogatory question. At no time did PVFA move to compel more specific answers or oppose the workers' motion for a protective order to allow the workers' attorney to make the specific calculations for the largely uneducated workers. Moreover, we find that even had PVFA not waived this claim, it would fail for lack of prejudice.

## B. CLASS CERTIFICATION

PVFA next attacks the district court's class action certification under Fed.R.Civ.P. 23(b)(3) on grounds that it violates Fed.R.Civ.P. 23(c)(1) and for want of predominate common questions sufficient to justify a class action under Rule 23(b)(3). We reject both arguments.

Rule 23(c)(1) provides that a class action certification decision "may be altered or amended before the decision on the merits." PVFA argues that the trial court reached the merits on liability and was, therefore, precluded from certifying the class on remand for a determination of damages.

We specifically invited the district court to reconsider its decision denying class action certification on remand. *Salazar,* 765 F.2d at 1350. Such certification decisions are interlocutory and can be altered later under Rule 23(c)(1).

*Elster v. Alexander*, 608 F.2d 196, 197 (5th Cir.1979). *See also* 7B C. Wright & A. Miller, Federal Practice and Procedure § 1785 at 133-35 (1986) (power to alter prior class certification decision has been utilized at various stages in the litigation, including after trial on the merits). We find no violation of Rule 23(c)(a) in the trial court's decision to certify the class on remand.

Rule 23(b)(3) provides that a court my certify a class only if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members. . . ." Fed.R.Civ.P. 23(b)(3). PVFA contends that the court erred on remand by certifying a class solely to redetermine damages. PVFA argues that common questions clearly did not predominate on damages issues, and that such determinations are not suitable for class treatment.

The trial court's certification decision on remand, however, encompassed the already-decided liability issues as well as the remaining damages issues. Common liability issues existed both as to the five technical FLCRA violations and the inclusion of the three-quarters guarantee and transportation allowance in the work agreement's terms. Because we find that these common liability issues predominated over the more diverse damages issues, we affirm the trial court's certification decision under Rule 23(b)(3). *See Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980) (upholding appellate court's decision reversing trial court and certifying class action on grounds that entry of judgment for plaintiffs over their objection did not moot the case and terminate their right to appeal denial of certification: plaintiffs' desire to spread litigation costs among all class

members constituted a continuing interest in the appeal's outcome).

C. CLASS MEMBERS ENTITLED TO RECOVERY

The district court initially permitted recovery only for those plaintiffs who were named in one of the original complaints and had filed answers to PVFA's interrogatories. PVFA argues that the district court erred on remand by including in the resurrected class three groups of workers whose claims had been previously barred: (1) those who were named as parties before the first appeal but who failed to answer PVFA's interrogatories; (2) those never named as plaintiffs in the original lawsuits; and (3) those who were members of the Zuniga group of plaintiffs. We agree, and accordingly exclude all three groups from recovery.

The court dismissed the first of these groups of workers for failure to answer PVFA's interrogatories. These workers never appealed the dismissal of their claims. Therefore, they had no claims to revive when the trial court changed its certification decision on remand.

For similar reasons we must deny recovery to group two. Although one subgroup of these workers had answered interrogatories before the first appeal, the trial court dismissed their claims on grounds that they were never named as plaintiffs in the suit. With the exception of a few workers who were later found to have been named in one of the four complaints, we upheld the trial court's dismissals of these workers. *Salazar*, 765 F.2d at 1351-52. Belated certification does not revive their nonexistent claims.

A second subgroup of unnamed workers submitted class claim forms after the district court certified the class on remand. The two-year statute of limitations had run during the time between the original denial and the district court's reversal. When an appellate court overturns a district court's denial of class certification, the date of original filing, rather than the date of eventual certification, is used to determine whether the claims of potential class members are time-barred. *Satterwhite v. City of Greenville*, 578 F.2d 987, 997 (5th Cir.1978) (en banc). Were this rule not to apply, appeals of certification would most often be meaningless. However, here we affirmed denial of class certification, even though we invited the district court to reconsider. *Salazar*, 765 F.2d at 1350. The trial court's reconsideration of the certification issue did not, and could not, diminish the import of our affirmance for time preclusion issues. The statute should not toll for those workers who did not intervene or file individual claims after certification was denied.

The workers cite *United Airlines v. McDonald*, 432 U.S. 385, 97 S.Ct. 2464, 53 L.Ed.2d 423 (1977) for the proposition that the statute of limitations does not run against the claims of putative class members while certification is subject to reconsideration. In that case, the Supreme Court held that a putative class member timely filed her motion to intervene under Fed.R.Civ.P. 24 because she promptly moved to protect unnamed class members when she learned that named class representatives had settled and would not appeal denial of class certification. *Id.* at 396, 97 S.Ct. at 2470-71. The court stressed that McDonald filed her motion (1) to obtain appellate review of the district court's class certification denial, not her

individual claim for a substantive Title VII violation; and (2) acted as soon as she realized the named class representatives would not protect unnamed class members' interests. *Id.* at 392-94, 97 S.Ct. at 2468-70. Neither consideration applies to the workers at issue.

Finally, we exclude the Zuniga group of plaintiffs because their claim is barred by the statute of limitations. They gained no tolling benefit from the district court's reconsideration of class certification.

The workers challenge the district court's denial of damages to nine class members. We are not persuaded that the district court was clearly erroneous in rejecting the credibility of witnesses testifying on behalf of these workers. In its brief, PVFA points to several contradictions in the testimony that support the district court's credibility decisions. We therefore affirm the district court's denial of damages to these nine workers.

## D. DAMAGE CALCULATIONS

PVFA next contends that in order to calculate actual damages the district court erroneously relied on interrogatory answers, which PVFA contends were inadmissible hearsay. PVFA further objects to inferences drawn by the district court. The trial court's reliance on interrogatory answers and certain inferences, in addition to live testimony, was not an abuse of discretion since the farmers lost or destroyed almost all of the relevant wage records.[6] We find the interrogatory answers admissible

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[6] The farmers contend that we rejected interrogatory answers as inadmissible hearsay on the first appeal. This is not

(Continued on following page)

under Fed.R.Evid. 803(24), the catch-all hearsay exception. The damages evidence was bound to be inexact because the second trial occurred nearly a decade after the violations and required testimony from uneducated, non-English-speaking laborers. In comparison to the trial date, the claim forms were at least completed relatively soon after the harvest season. This procedure is, in fact, similar to the method we approved in FLSA cases where proof of wages is measured under a looser "just and reasonable inference" standard when employers have kept inadequate wage records. *See Reeves v. International Tel. & Tel. Corp.*, 616 F.2d 1342, 1351 (5th Cir.1980). In any event, any error was not sufficient to justify a reversal.

The same standard also justifies the trial court's reliance on certain assumptions in extracting damage calculations from this confusing mass of evidence, such as the court's assumption of a 5-day work week and an 8-hour day when neither the workers nor the farmers could provide precise information. Absolute precision in

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(Continued from previous page)

correct. We rejected the district court's procedure for determining damages, which relied in part on interrogatories, because the court did not obtain PVFA's consent to that procedure. The use of interrogatory answers at the second trial was quite different from the first trial. At the second trial every plaintiff testified to the court and the court based its determination on the live testimony of the workers. Although this does not cure the hearsay defect in the interrogatory answers, the court's procedures at the second trial were more justifiable in light of the difficult nature of the proceedings and the lack of evidence, which is due, in part, to either the farmers' negligence or misconduct.

these damages would have been impossible and we find these sound estimates to be adequate.

PVFA also complains that the trial court erred by permitting a computer programmer to testify as an expert witness. The programmer testified about how he generated certain printouts, which compiled damage information from the workers' claim forms and interrogatory answers. The district court admitted the printouts into evidence. PVFA contends that the expert was not qualified to testify about printouts based on inadmissible evidence. PVFA's argument is essentially a restatement of its hearsay objection to the interrogatory answers upon which the printouts were based. As previously stated, we affirm the trial court's reliance on the interrogatory responses under Fed.R.Evid. 803(24). Since no objection is made to the individual's computer programming credentials and since his testimony simply established that his printouts compiled this information without distorting it, we find no reversible error.

PVFA next argues that the trial court improperly awarded full damages to workers whose H-2 visas were revoked by INS before expiration. PVFA contends that because the farmers were prohibited from hiring workers without valid visas, such workers have no claim subsequent to revocation. PVFA cites to INS agent Keim's testimony that many aliens admitted pursuant to H-2 visas in 1977 were excludable aliens, and that approximately 50 H-2 visas were later revoked when this was discovered. PVFA also cites to testimony of several workers who acknowledged that their visas had been taken away. The workers point out, however, that INS reclaimed some workers' visas for other reasons, such as

when the farmers could no longer provide them with work. Whether or not any particular worker's visa had been revoked, rather than simply "lost" or "taken away" pursuant to the worker's voluntary departure, was a factual question for the trial court. The district court's disposition of this issue is protected by the clearly erroneous standard. In light of the deference due pursuant to this standard, we see no reason to disturb the findings implicit in the trial court's damage award. Because the evidence in the record is ambiguous, we refuse to modify the district court's damage award on this basis.

PVFA also challenges the district court's findings as to the visa expiration dates used to calculate damages. PVFA's visa petitions sought visas for six months in 1977 and seventy days or one year in 1978.[7] Some delay occurred, however, between the time the visas were requested and the time they were issued. In issuing the visas, the INS, on its own, altered the visas' expiration dates to take account of this delay. The court used these new expiration dates in calculating damages. PVFA claims that the visa termination dates used to calculate damages should have been those set forth in the farmers' INS visa petitions. The district court's determination of this issue resolves a factual question about the terms of an ambiguous work contract, and is therefore protected by the clearly erroneous standard. We do not find the

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[7] PVFA filed H-2 petitions with the INS in 1977 and 1978. PVFA specified in its 1977 petition that it needed 661 workers from May 1, 1977 until November 30, 1977. In 1978, PVFA specified that it needed 330 workers for 70 days from May 1, 1978 until July 10, 1978 and 70 workers for 12 months from May 1, 1978 until April 30, 1979.

trial court's decision to use the visa expiration dates on the visas to be clearly erroneous. The workers were given visas and could have reasonably relied on the dates set forth thereon. Moreover, some growers employed workers for the full period of the visas. Given these facts, the court could have reasonably concluded that the work contract between the growers and the workers was governed by the visa expiration dates on the visas. Because these findings of fact are not clearly erroneous, we affirm the trial court's findings with respect to the visa expiration dates used to calculate damages.

## E. PREJUDGMENT INTEREST

The workers contend that pursuant to Tex.Rev.Civ.Stat. § 5069-1.05 (Vernon 1985), they are entitled to prejudgment interest on actual damages awarded for breach of the work agreement. Because we find this case based entirely on FLCRA, the Texas statute and state law cases cited in the workers' brief are inapposite. We instead turn to federal law.

An award of prejudgment interest is not precluded simply because the damages are based on FLCRA. In *Montelongo v. Meese,* 803 F.2d 1341, 1354 (5th Cir. 1986), we reversed an award of prejudgment interest for liquidated damages under FLCRA on grounds that prejudgment interest is awarded to fully compensate a plaintiff for an actual monetary loss sustained as a result of a defendant's breach of an obligation. *Cf. Illinois Central Railroad Co. v. Texas Eastern Transmission Corp.,* 551 F.2d 943, 944 (5th Cir.1977) (contrasting actual damages with penalties, on which prejudgment interest does not normally accrue). We noted, however, that interest from the

date of the breach would have been "appropriate" had plaintiffs chosen to recover actual damages. *Id.*

We see no bar to an award of prejudgment interest on actual damages based on FLCRA. However, we are persuaded that such determinations are within the discretion of the trial court. *Bricklayers' Pension Trust Fund v. Taiariol,* 671 F.2d 988, 990 (6th Cir.1982) (decision whether to award prejudgment interest within discretion of district court); *Oil, Chemical & Atomic Workers International Union, Local No. 4-447 v. American Cyanamid Company,* 546 F.2d 1144 (5th Cir.1977) (argument that plaintiffs should be awarded prejudgment interest to make them whole is insufficient to find that district court abused its discretion). We find no basis for holding that the district judge abused his discretion in denying prejudgment interest on actual damages based on FLCRA.

The judgment of the district court is, accordingly

AFFIRMED IN PART and REVERSED IN PART.

**EXHIBIT D**

**871 F.2d 121**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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**No. 87-1512, 87-1513, 87-1701**

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**AMADO SALAZAR CALDERSON, ET AL.,**
**Plaintiffs-Appellees-Cross-Appellants,**

**versus**

**PRESIDIO VALLEY FARMERS ASSOCIATION, ET AL.,**
**Defendants-Appellants-Cross-Appellees.**

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**Appeals from the United States District Court for the Western District of Texas**

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*ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC*

(Opinion 1-20-89, 5 Cir., 198___, ___F.2d___)

(MARCH 20, 1989)

Before GOLDBERG, HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM:

[✓] The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure

and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

[ ] The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

[ ] A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Patrick E. Higginbotham
United States Circuit Judge

**EXHIBIT E**

**765 F.2d 1334**

**Amado SALAZAR-CALDERON, et al., Plaintiffs-Appellants, Cross-Appellees,**

**v.**

**PRESIDIO VALLEY FARMERS ASSOCIATION, et al., Defendants-Appellees, Cross-Appellants.**

**No. 84-1163.**

United States Court of Appeals, Fifth Circuit.

July 25, 1985.

Some 492 Mexican nationals brought action against association and its grower members who employed them during 1977 harvest season, alleging violations of terms and conditions of employment agreement, as well as numerous provisions of the Farm Labor Contractor Registration Act. From judgment of the United States District Court for the Western District of Texas, Lucius Desha Bunton, III, J., plaintiffs, though prevailing, appealed various aspects of judgment, and defendants cross-appealed. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that: (1) adverse effect wage rate of $2.83 per hour was not one of the terms of plaintiff's employment agreement, but 3/4 work guarantee and $5 weekly transportation allowance were part of that agreement; (2) nonprofit association of grower members was a "farm labor contractor" subject to requirements of the Act and, furthermore, association and growers were joint employers of plaintiffs; (3) association and growers intentionally violated the Act; (4) liquidated damages awarded for breaches of the Act were not so low as to constitute abuse of discretion; (5) award of damages for alleged breaches

of employment agreement would be vacated, with remand for recalculation of those damages; (6) denial of class certification was proper; (7) recalculation of limitations period for certain plaintiffs was warranted; and (8) various clerical and other errors in the judgment would have to be addressed by the district court.

Affirmed in part, reversed in part, vacated in part, and remanded.

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Edward J. Tuddenham, Tex. Rural Legal Aid, Hereford, Tex., David Hall, Weslaco, Tex., for plaintiffs-appellants, cross-appellees.

Robert A. Skitol, Washington, D.C., for amicus Farmworker Justice Fund.

Thomas Bacas, Washington, D.C., for defendants-appellees, cross-appellants.

Appeals from the United States District Court for the Western District of Texas.

Before THORNBERRY, RUBIN and HIGGINBOTHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

This case presents claims by 492 Mexican nationals against the Presidio Valley Farmers Association and its grower members who employed them during the 1977 harvest season. Plaintiffs alleged that defendants violated the terms and conditions of their employment agreement, terms set, for the most part, by federal law, as well as

numerous provisions of the Farm Labor Contractor Registration Act.

The plaintiffs prevailed below, but appeal arguing that the district court erred in determining the terms of their employment agreement and in assessing damages. The plaintiffs also ask us to reverse the district court's refusal to certify this case as a class action, and, in the event we also refuse, ask us to reverse its decision that the claims of certain plaintiffs are barred by limitations. Defendants cross appeal, arguing that the district court erred in assessing any liability at all. We find defendants' cross-appeal to be without merit, but conclude that plaintiffs' challenges demonstrate, at least in part, reversible error. We affirm in part, reverse in part, and remand.

I

The Presidio Valley of Texas is a small but fertile agricultural region situated along the Rio Grande approximately 200 miles downstream from El Paso and directly across the border from Ojinaga, Chihuahua. Its principal crops include onions, melons, chile peppers and cotton. Illegal aliens from Ojinga and neighboring Mexican territory have long been the primary source of labor for the Valley's farms.

The circumstances that gave rise to this controversy began in early 1977, when the Immigration and Naturalization Service informed growers in the Valley that it intended to step up its enforcement activity in the area. Aware that the effect of such enforcement would be cut off labor needed for the 1977 harvest, the growers investigated INS's H-2 visa program. Under H-2, INS may issue

visas to aliens for temporary employment in the United States upon petitions of the importing employer. *See* 8 U.S.C. §§ 1101(a)(15)(H), 1184(c).[1] We describe first the aspects of the H-2 visa program applicable to the issues before us, and then turn to defendants' use of that program during the 1977 harvest season.

-1-

The regulations implementing INS's authority to issue H-2 visas require applications by the petitioning employer to be accompanied by a certification from the Secretary of Labor that U.S. workers are not available for the work and that employment of the alien workers will not adversely affect workers in the U.S. *or* a notice stating that such certification cannot be made. 8 C.F.R. 214.2(h)(3). The Department of Labor has in turn set forth minimum standards of employment and procedures that must be followed before it will issue its certifications for H-2 petitions.

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[1] Section 1184(c) of Title 8 provides:

> The question of importing any alien as a nonimmigrant under section 1101(a)(15)(H) . . . of this title in any specific case or specific cases shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer. Such petition shall be made and approved before the visa is granted. The petition shall be in such form and contain such information as the Attorney General shall prescribe. . . .

The Attorney General has delegated to the INS Commissioner the responsibility for granting such petitions. *See* 8 U.S.C. § 1103.

In 1977 those regulations were codified at 20 C.F.R. §§ 602.10-602.10b; essentially the same regulations are currently codified at 20 C.F.R. § 655.202-207 (1984). Basically, the DOL regulations require an employer seeking certification for alien farmworkers first to attempt to recruit U.S. workers by circulating job notices known as "clearance orders" among the state and local employment bureaus. To ensure that the employment of aliens under H-2 will not adversely affect the working conditions of similarly employed U.S. workers, the regulations further require that the petitioning employer offer specific terms of work including housing, meals, free tools, a written contract, a guarantee of work or wages for three-fourths of the contract period, and a special wage known as the adverse effect wage rate. 20 C.F.R. §§ 602.10a-602.10b (1977).

Regardless of whether or not DOL certifies the petition of the importing employer, INS makes the final decision on the issuance of the H-2 visa petitions. Where no certification is provided by DOL, however, the petitioning employer must "present countervailing evidence [to the INS] that qualified persons in the U.S. are not available and that the employment policies of the Department of Labor have been observed." 8 C.F.R. § 214.2(h)(3). As will be explained, *infra*, we interpret this regulation to mean that the employment conditions mandated by the DOL regulations must be offered to aliens to be employed through the H-2 program unless the INS Commissioner decides that some or all of DOL's conditions will not be required.

The growers in the valley did not petition for the H-2 visas individually, but instead formed an association, the Presidio Valley Farmers Association, for that purpose. The PVFA's thirty-three members ranged from small family farmers to large corporate agribusinesses, but all shared a common goal – the creation of a pool of legal alien labor in the Valley. The growers combined forces so that the administrative tasks necessary to obtain the visas from INS could be achieved more easily and more rapidly, and thus relieved individual growers of the recruiting and application responsibilities they otherwise would have faced.

For example, the PVFA, rather than the individual growers, determined the terms and conditions of employment which all Association members would offer. PVFA then filed the required clearance orders with the Texas Employment Commission and circulated advertisements offering the employment in both Texas and Mexico. PVFA then requested DOL to issue certification for its H-2 visa petitions.

DOL refused to certify the petitions, however, primarily on the ground that there was insufficient housing available in the Valley to accommodate migrant workers. DOL also considered the terms of employment offered by PVFA to be insufficient under its regulations. For example, DOL sought to require PVFA to pay its workers an AEWR of $2.83 per hour, but the PVFA repeatedly offered to pay only the minimum wage, $2.20 per hour; and the PVFA failed to offer its workers the required 3/4 work guarantee for the terms of their visas.

Despite DOL's refusal to certify the petitions, PVFA urged INS to grant the visas, explaining that the lack of worker housing in Presidio was not a real problem because nearly all of the workers to be employed under the visas could easily commute daily from their homes in Ojinaga. It is unclear from the record precisely what other issues were discussed with INS, but on June 9, 1977, acting INS Commissioner Mario Noto approved PVFA's petition for 809 visas for Mexican nationals to work in the Valley during the 1977 harvest season.[2] The visa petitions offered, *inter alia*, 40-60 hours of work per week for the workers at the minimum wage and a transportation allowance for each worker of $5.00 per week.

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This case presents allegations by the alien workers employed in the Valley under the H-2 visa program that PVFA and its members violated the terms of their employment contracts with the workers, as well as numerous sections of the Farm Labor Contractor Registration Act, 7 U.S.C. § 2041 *et seq.* (repealed 1982), during the 1977 harvest season. The suit was originally commenced as a number of separate class actions, all filed in the Western District of Texas, some of which were based in contract and others which were based on alleged violations of the FLCRA. The actions were eventually consolidated under the *Salazar* heading.

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[2] PVFA actually filed two separate visa petitions. The first sought visas for 661 Mexican nationals to work from May 1 to November 30, 1977; the other sought visas for 148 Mexican nationals to work from May 1, 1977 to April 30, 1978. Both were granted.

As noted above, the plaintiffs' claims were of basically two varieties: contract claims and claims for violations of the FLCRA. The contractual theory was, in short, as follows. The PVFA, in offering visas to the plaintiffs, offered them a contract of employment for the duration of the visas. The terms of the contract were the conditions of employment included in the visa petitions and the employment conditions required by DOL's H-2 regulations. For plaintiffs, the most important of these conditions were the 3/4 work guarantee, an AEWR of $2.83 per hour, and the $5.00 per week transportation allowance.

Plaintiffs further contended that the individual growers, as well as PVFA as an entity, were their joint employers. The employment contract with PVFA, under plaintiffs' theory, was akin to a guarantor arrangement. The PVFA promised that if plaintiffs made themselves available during the terms of the visas, grower members would provide them work, and that if the individual growers failed to honor the terms of the employment agreement, PVFA would be liable for the breach.

The plaintiffs' FLCRA claims dovetailed with, and to some extent overlapped, the contract claims. As we shall explain in more detail, *infra*, the FLCRA, before its repeal in 1982, regulated farm labor contractors – middleman who recruit and hire migrant farmworkers – and required certain minimum standards for the employment of such workers. Some of these standards duplicated those required by DOL's H-2 regulations.

The district court refused plaintiffs' request to certify the 809 H-2 workers as a class under Fed.R.Civ.P. 23(b)(3), and the case went forward with 492 named plaintiffs, all Mexican nationals who worked for PVFA members during the 1977 harvest season. Because of the large numbers of parties suing, however, counsel for both sides took a number of steps to facilitate the court's decision in the case. First, the parties agreed to submit to the court cross motions for summary judgment so that the defendants' obligations under the FLCRA and the terms and conditions of employment that defendants were required to offer could be established. The parties stipulated to certain facts and supported their respective motions with documentary proof that had been developed in discovery.

After hearing arguments on the motions, the court made the following rulings. It held first that PVFA and its members were joint employers of the plaintiffs under a work agreement whose terms were in large part determined by DOL's H-2 regulations. The court found that three provisions in the regulations – the AEWR of $2.83 per hour, the 3/4 work guarantee, and the $5.00 per week transportation allowance – were not required conditions of employment, but held that in other respects the employment terms of the regulations should have been honored by the defendants. The court also found that PVFA qualified as a "farm labor contractor" under the FLCRA, thus triggering the obligations of that act.

As we will describe in more detail, *infra*, the court then ordered a separate trial on the issue of liability and damages. Following the trial and after considering

motions for summary judgment by both parties, the court determined that PVFA had breached a number of its FLCRA and contractual obligations. These include PVFA's failure: 1) to register with the DOL as a farm labor contractor; 2) to give the workers written disclosures of the terms of their employment; 3) to post the terms of employment at the work site; 4) to keep wage records; 5) to provide wage receipts; and 6) to abide by the following conditions of employment: a) provision of insurance; b) maintenance of wage records; and c) provision of free tools.

The plaintiffs waived their rights to actual damages and instead sought liquidated damages under the FLCRA for both the breaches of the found terms of employment and of the various provisions of the FLCRA.[3] The court assessed damages of $15.00 for each of the violations of the FLCRA – e.g., PVFA's failure to register with the DOL as a farm labor contractor, its failure to provide plaintiffs with a written employment agreement, the growers' failure to maintain wage records – and damages of $300.00

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[3] The FLCRA was amended in 1974 so as to provide a private right of action and a statutory damages provision. Under 7 U.S.C. § 2050a, workers employed by farm labor contractors or other agricultural employers who intentionally violate the Act's provisions may sue for actual damages or, in the absence of actual damages statutory damages of up to $500.00 per violation.

The FLCRA requires, *inter alia*, that if a farm labor contractor acts as an employer he must abide by the terms of his work agreement, *see* 7 U.S.C. § 2044(b)(4), thus the plaintiffs asserted both their contract claims and FLCRA claims under the Act's statutory damages provision.

for defendants' failure to abide by the terms of the work agreement – e.g. payment at the minimum wage, the failure to provide free tools. The damages award for these latter violations was limited to piece rate workers.

The court then determined which individual plaintiffs were entitled to these damages on the basis of their responses to the defendants' interrogatories. If the worker had filed a response and was not one whose complaint was barred by limitations, he was awarded a total of $75.00 for the five found violations of the FLCRA. If the worker had been employed on a piece rate basis he was awarded an additional $300.00 for the breaches of the work agreement. The damages awarded totalled $53,550.00, and the defendants were held jointly and severally liable for that amount.

Plaintiffs appeal, urging that the district court erred in concluding that the work agreement did not include an AEWR of $2.83 per hour, a 3/4 work guarantee, and a $5.00 per week transportation allowance. Plaintiffs also complain that the damages awarded were too low, that their suit should have been certified as a class action, and that if denial of certification was proper, the court erred in determining that certain groups of plaintiffs were barred by limitations. Defendants cross appeal, arguing that the district court erred in imposing any liability at all.

II

The primary issue on appeal is whether the district court erred in determining the terms and conditions of employment the defendants were obligated to provide

the plaintiffs. Plaintiffs contend that the court erred in failing to find that an AEWR of $2.83 per hour, a 3/4 work guarantee, and a $5.00 per week transportation allowance were terms of their employment agreement.

As described above, the DOL regulations that govern the terms of employment that should be offered H-2 workers – 20 C.F.R. §§ 602.10a-602.10b (1977) – do not themselves create any private right of action, but plaintiffs argue that because such regulations have the force of law, these terms were part of their employment agreement with PVFA and its members. Defendants contend that because DOL's certification of H-2 visa petitions is only advisory to the INS – the INS has the final say in determining whether or not to issue H-2 visas – the only terms of employment applicable here were those PVFA and growers actually *offered* to the plaintiffs. The district court took a middle ground, deciding that DOL's H-2 regulations were "not irrelevant," but declining to find that *all* of the regulations were part of the agreement.

The plaintiffs' position an appeal is that the discretion given to the INS to approve H-2 petitions without certification from the DOL means that the DOL regulations apply *unless* the INS waives such requirements. The plaintiffs find support in the INS regulation which requires that in the absence of certification from the DOL, the petitioning employer must "present . . . evidence that the employment policies of the Department of Labor have been observed," 8 C.F.R. § 214.2(h)(3). The INS, which was for a time a party to this suit, concurred in plaintiffs'

construction.[4] Defendants maintain their position that certification has nothing to do with the terms of employment so long as INS issues the H-2 visas without such certification.

The effect of the DOL regulations is not apparent from their face, nor have we any appellate authority to guide us. However, given the purpose of certification and the employment conditions set by Dol's H-2 regulations of ensuring that foreign workers are employed on terms that will not adversely affect the employment available to similarly situated U.S. workers, we conclude that the plaintiffs' proffered interpretation is the more plausible and we adopt it. We hold that the terms of employment set out in DOL's H-2 regulations, 20 C.F.R. §§ 602.10a-602.10b (1977), were the terms the defendants were required to offer unless those terms were waived by the INS when it approved defendants' visa petitions. We now examine the plaintiffs' contention that the three requirements rejected by the district court were in fact part of their work agreement.

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The requirement that defendants pay an AEWR of $2.83 per hour was hotly disputed both below and on appeal. Although it is not disputed that DOL requested that PVFA offer an AEWR of $2.83 per hour, the defendants contend that because DOL did not publish an

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[4] The INS stated in admissions filed with the district court:

> It was in 1977, and continues to be, the policy of the INS that the Department of Labor has primary responsibility for determining and enforcing the appropriate minimum labor standards for H-2 workers employed in this country pursuant to an approved visa petition.

AEWR for agricultural employees in the State of Texas until 1978, the DOL could not require such wages to be paid. Plaintiffs respond that prior to 1968, DOL published an AEWR for all states, and that after 1976 DOL relied on the methodology published in 41 Fed. Reg. 25018 (June 22, 1976) for calculating such wages. Although the DOL continued publication of AEWRs for about a dozen states through 1977 and this list did not include Texas, plaintiffs explain that DOL policy was to require payment of an AEWR in all states and to publish AEWRs for only those states where significant numbers of H-2 workers were employed.

Defendants reply that the regulation granting DOL the authority to determine AEWRs for those states for which rates were not published, *see* 20 C.F.R. § 602.10b(a)(3) (1969), was deleted in 1970. Defendants also point to DOL's statement in 20 C.F.R. § 655.207(a) (1978) that, "except as otherwise provided in this section, the adverse effect rates for all agricultural and logging employment shall be the prevailing wage rates in the area of intended employment," and the language used in the Federal Register notice in 1978 which proposed adding Texas to the list of states for which an AEWR was published: "the adverse effect wage rate for Texas *will be established and set* to prevent the employment of these aliens from having an adverse effect on the wages of U.S. workers who are similarly employed." 43 Fed.Reg. 22996 (May 30, 1978) (emphasis supplied).

In our view, all that can be determined from the history of DOL's AEWR regulations is that the validity or even the existence of non-published AEWRs is at best uncertain. Given the deletion of the regulation that gave

DOL the authority to determine unpublished AEWRs and the express language in DOL's regulations that *were* published in 1978, however, we are persuaded, on balance, that there was no AEWR in effect for Texas in 1977. It is well-established that an agency is bound by its own regulations. *See United States v. Nixon*, 418 U.S 683, 696, 94 S.Ct. 3090, 3101, 41 L.Ed.2d 1039 (1974). We hold that the district court correctly determined that the offered wage rate of $2.20 per hour, the minimum wage in 1977, was the rate that should have been paid under plaintiffs' employment agreement.

-2-

The district court refused to find that the 3/4 work guarantee of 20 C.F.R. 602.10a(h) (1977), was part of plaintiffs' work agreement. The 3/4 guarantee is a promise that agricultural workers offered employment under H-2 program will be given work or wages for at least 3/4 of the period for which they are to be employed. The DOL requires the guarantee as a condition of employment in order to assure that growers do not "artificially" inflate the labor pool by recruiting more workers than are needed. The district court explained that given the extraordinary circumstances surrounding the issuance of the plaintiffs' visas and the fact that the labor requirements of the growers varied considerably through the harvest season, it would be unduly harsh to have found the 3/4 guarantee to be part of the work agreement.

Plaintiffs challenge this ruling on the ground that "harshness" is not an adequate reason to permit defendants to avoid the regulation. We agree. There is no

"hardship" exception to DOL's labor standards for H-2 workers. *Florida Sugar Cane League v. Usery*, 531 F.2d 299, 304 (5th Cir.1976), *quoting Elton Orchards, Inc. v. Brennan*, 508 F.2d 493, 500 (1st Cir.1974). Moreover, there is no indication that the INS excepted the 3/4 work guarantee when it approved the visas, and INS's position in this litigation was that it has never excepted that requirement. As we stated above, we hold that in absence of an INS exception, DOL's H-2 regulations determined the minimum conditions of plaintiffs' employment. The harshness of the requirement ought to have been put before the INS.

-3-

The plaintiffs also complain that the district court should have found that the defendants were obligated to pay each worker a $5.00 per week transportation allowance. The pertinent DOL regulation, 20 C.F.R. § 602.10a(g) (1977), required employers petitioning for H-2 workers to offer "transportation from the workers' on-the-job-site living quarters to the place the work is to be performed . . . without cost to the worker." Because none of these plaintiffs were "on-the-job-site" workers and instead commuted from their homes in Mexico, the district court found that the regulation by its very terms was inapplicable.

Plaintiffs argue on appeal that their right to the transportation allowance does not hinge on the terminology of DOL's regulation, explaining that PVFA *promised* in its visa petitions that it would pay a $5.00 transportation allowance to workers who accepted the visas. By offering this term of employment even where the DOL regulations

did not require it, plaintiffs contend, the $5.00 allowance became part of the employment agreement.

We think planitiffs' point is well-taken. The defendants have repeatedly argued that the terms of plaintiffs' employment were only those terms defendants chose to offer, and the record demonstrates that a transportation allowance was in fact offered by PVFA. Although the regulations set the minimum terms of employment, we do not believe they prohibited the defendants from offering additional benefits. Having promised to pay each plaintiff a $5.00 per week transportation allowance, PVFA became contractually obligated to do so.

III

The next set of issues we must address are raised in PVFA's cross appeal. PVFA argues that the district court erroneously concluded that the Association acted as a farm labor contractor when it petitioned the INS for visas on behalf of its members and when its members recruited the plaintiffs to accept the visas. PVFA also argues that even if it was a farm labor contractor, its violations of the FLCRA and the work agreement were not "intentional" and thus cannot support an award of damages, and that most of the alleged violations were committed by individual growers rather than the Association. We address each contention in turn.

-1-

The FLCRA was enacted in 1963 to protect migrant and seasonal farmworkers from abuses of the farm labor

contractor system. *See Almendarez v. Barrett-Fisher Co.*, 762 F.2d 1275, 1279 (5th Cir.1985); *Soliz v. Plunkett*, 615 F.2d 272, 276 (5th Cir.1980). *See generally* Note, *A Defense of the FLCRA*, 59 Texas L.Rev. 531 (1981). The Act regulated both those who qualified as farm labor contractors and those who employed such contractors. In brief, "[t]he Act guarantee[d] that farmworkers receive[d] notice of the terms and conditions of employment offers, and generally deter[red] employers from exposing farmworkers to hazardous conditions, breaching employment agreements, or denying farmworker employees the rights and benefits secured by other federal statutes." Note, *supra*, at 531.

PVFA argues that the Act cannot apply here because PVFA did not qualify as a farm labor contractor. There are several requirements under the statute. A farm labor contractor is one who: (1) recruits, solicits, hires, furnishes or transports, (2) for a fee, (3) migrant workers, (4) for agricultural employment. 7 U.S.C. § 2042(b). Here the "fee" requirement is satisfied by the dues the grower members paid to the PVFA, and the last two requirements are concededly met. The PVFA denies, however, that in petitioning for the H-2 visas and offering those visas to the workers through its grower members that it "recruited," "solicited," "hired," or "furnished" workers to its members.

The district court found that three actions of the PVFA met this requirement of the statute. First, the articles of incorporation for the PVFA set out as its purpose to "contract for and obtain migrant labor for the use of its members"; second, the PVFA solicited workers through

newspaper and radio ads in both Texas and Mexico pursuant to DOL certification procedures; and third, the PVFA petitioned INS for the H-2 clearance visas.

The PVFA responds that its articles of incorporation are irrelevant because they were written after these plaintiffs were employed, that plaintiffs cannot rely on the radio and newspaper ads because none of them were actually recruited through those ads, and that the H-2 visa petitions were acts solely between PVFA and the INS. PVFA adds that most if not all of the 809 aliens for whom visas were sought had worked or were already working for PVFA members. Thus the recruitment process for their employment under H-2 involved only the efforts of the member growers to determine which of their current or past employees desired to have PVFA petition for a visa for them. Finally, PVFA argues that a non-profit association such as itself simply is not the sort of middleman/recruiter that the FLCRA was intended to cover.

We are not persuaded. The articles of incorporation are relevant evidence of the purpose for which PVFA was formed in 1977, and the advertisements and visa petitions were indisputably direct efforts by the PVFA to create a pool of temporarily legalized labor which its members could share. It was PVFA, not the individual growers, who determined what terms of employment would be offered in the H-2 visa petitions. It was PVFA, not the individual growers, that was listed as the plaintiffs' employer on the INS visa petitions. That the final step in the recruiting process was carried out by PVFA grower members who approached those workers already on their farms does not remove PVFA's "middleman" status, for the efforts of the individual growers were made *on behalf*

of the PVFA and its members. In fact, several of the growers did no recruiting and relied on the efforts of other members to recruit enough Mexican workers to meet the needs of all of the growers in the Valley. Indeed, although the majority of the plaintiffs were employed by a single grower, over the course of the harvest many worked for more than one PVFA member because the growers shared the workers among themselves as their employment needs varied.

In short, the record demonstrates that the PVFA, as an entity and through its members, acted very much as a middleman between the member growers and the plaintiffs, and succeeded in creating a legalized labor pool for the growers' common benefit. These activities fit comfortably within those Congress intended to regulate under the FLCRA. *See Almendarez,* 762 F.2d at 1281 (holding vegetable packing shed operators to be contractors under the FLCRA where the operators "[could] identify no functional distinction between their activities . . . and those of the middlemen recognized as farm labor contractors [under the Act]."

Nor is our analysis changed because of PVFA's status as an unincorporated association at the time these events took place. Similar associations of growers have previously been found to be farm labor contractors under the Act, *see Marshall v. Coastal Growers Ass'n,* 598 F.2d 521 (9th Cir.1979), and commentators have urged that coverage of nonprofit associations of farmers was intended by the drafters of the FLCRA. *See* Note, *supra,* 59 Texas L.Rev. at 553-54. The defendant growers received the benefits of combining in the Association; we will not now ignore its role.

Nor do we agree with defendants that the district court erred in holding the PVFA and its member growers liable for damages under the FLCRA for their "intentional" violation of the Act's provisions. We set out the test for "intent" under the FLCRA in *Castillo v. Givens*, 704 F.2d 181 (5th Cir.), *cert. denied*, ___ U.S. ___, 104 S.Ct. 160, 78 L.Ed.2d 147 (1983). Intentional means "conscious or deliberate"; *id.* at 197; there is no requirement of a specific intent to violate the FLCRA; rather, "the standard for an intentional violation [is] . . . 'the common civil standard which holds a person liable for the natural consequences of his or her acts.' " *Id.* at 197-98, quoting *DeLeon v. Ramirez*, 465 F.Supp. 698, 705 (S.D.N.Y.1979). The district court applied the *Castillo* test in determining that the defendant's violations were intentional.

Defendants argue that the Court's recent opinion in *Trans World Airlines, Inc. v. Thurston*, ___ U.S. ___, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985), which overturned our construction of "willful" under the FSLA [sic] in *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir.1971), *cert. denied*, 409 U.S. 948, 93 S.Ct. 292, 34 L.Ed.2d 219 (1972), suggests that our interpretation in *Castillo* was too generous. We disagree. The standard for showing willful violations of the ADEA so as to trigger its liquidated damages provisions, which Congress intended to be punitive in nature, *see Thurston*, 105 S.Ct. at 624, should not be applied here. As we explained in *Castillo*, the courts have construed the "intent" requirement necessary to trigger the damages provisions of the FLCRA so as to further the Act's *remedial* purposes. 704 F.2d at 198. *Accord Almendarez*, 762 F.2d at 1281. Our adoption of the general

civil standard for intent furthers that purpose, and we will not depart from it here.[5]

Defendants also suggest that the district court failed to make the factual findings necessary to support a conclusion that their violations of the FLCRA were intentional, because the court did not expressly find their acts to be "conscious or deliberate." Moreover, defendants argue, the record could not have supported such a finding. We are not persuaded. We think the district court's conclusion that defendants' acts met the intent standard set out in *Castillo* is both implicit and explicit in its memorandum opinion on liability and damages. For example, the court stated that it found that defendants carried out an "intentional pattern and practice" of failing to pay piece rate workers at the minimum wage and

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[5] Defendants also argue that their violations were not intentional because they were unaware of the FLCRA and the necessity of complying with it. The argument is without merit. Were we to require that a defendant have knowledge that he was violating the FLCRA before labelling his actions "intentional," we would change the intent standard to one of "specific intent," a standard we rejected in *Castillo*. The focus under the standard we adopted there is on the deliberateness of the conduct involved, not the defendant's knowledge of the Act.

In any event, the record contains sufficient evidence to support a conclusion that the defendants were aware of the FLCRA. The president of PVFA, Bill Bishop, admitted that he was aware of the Act in 1977 and that he had previously hired workers through farm labor contractors. In addition, the Texas Employment Commission called PVFA officials' attention to the Act in 1977 because the clearance orders PVFA filed with the Commission stated, as they were required to, that PVFA was in compliance with the FLCRA.

that plaintiffs suffered from "defendants' intentional violations of the FLCRA. . . ." We refuse to read the district court's opinion so hypertechnically as defendants. The court's conclusion that these violations were intentional is adequately supported by the record and is not clearly erroneous.

-3-

Lastly, defendants contend that PVFA cannot be held responsible for breaches of the FLCRA and work agreement to the extent that such violations occurred in day to day employment activity – e.g. the failure to pay adequate wages, provide wage receipts, or maintain wage records. These violations, defendants argue, were committed by the individual growers who employed the workers on a day to day basis and not by the PVFA, thus the PVFA cannot be held responsible for them.

We disagree because, in our view, the district court correctly found PVFA to be the joint employer of the plaintiffs. The PVFA cannot seriously challenge this finding since it repeatedly represented itself to be the plaintiffs' employer when applying to the INS for the H-2 visas. Indeed "employer" status was necessary to obtain the visas since they could be granted only on the petition of the "importing employer." In addition, as we explained in part III, 1 of this opinion, *supra*, the PVFA, acting for the joint benefit of its members, determined the terms and conditions of employment that the growers would offer and recruited workers to accept the visas. Its

members then freely shared the workers among themselves. We agree with the district court that these representations and actions render the PVFA liable for the FLCRA violations and breaches of the employment agreement as a joint employer of the plaintiffs.[6]

IV

Both plaintiffs and defendants attack the district court's award of damages. Plaintiffs contend that the court abused its discretion in determining liquidated damages for violations of the provisions of the FLCRA and that the liquidated damages award for defendants' breaches of the work agreement was inadequate and improperly limited to piece rate workers. Defendants do not challenge the damage awards relating to specific provisions of the FLCRA, but contend that plaintiffs did not properly prove up their damages for defendants' alleged breaches of the work agreement.

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[6] The defendants also argue that they cannot be held liable under the FLCRA because Congress extinguished plaintiffs' causes of action when it enacted the MSAWPA. *See infra* section IV, 1 and n. 7. This argument is without merit. Section 109 of Title 1 of the United States Code provides:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. . . .

There is no such expression of intent in the MSAWPA.

> The FLCRA provided in pertinent part that:
>
> If the court finds that the respondent has intentionally violated any provision of this chapter or any regulation prescribed hereunder, it may award damages up to and including an amount equal to the amount of actual damages, or $500 for each violation, or other equitable relief.

7 U.S.C. § 2050a(b) (repealed 1982). As we explained in *Beliz v. McLeod & Sons Packing Co.*, 765 F.2d 1317 (5th Cir.1985), the purpose of this civil remedy is both compensatory and punitive. It is designed to "correct the exploitive practices that have historically plagued the migrant farm labor market." *Id.* at 1332.

Although the statutory goals are readily apparent, our review of these awards is limited because the amounts set are a matter for the discretion of the district court. We have held that, when liquidated damages are sought under this provision, the district court has discretion to award an amount *up to* $500. *Castillo v. Givens*, 704 F.2d at 197 n. 37. The court is not *required* to award $500. *Id. See also Alvarez v. Joan of Arc, Inc.*, 658 F.2d 1217, 1224 (7th Cir.1981) (rejecting argument that where liquidated damages, rather than actual damages are sought, court must award $500 for violation). As we noted in *Beliz*, "[t]he courts have articulated no systematic criteria to guide the exercise of a trial court's discretion in fixing the amount of damages, but this is an almost inevitable result of imparting discretion. . . . Rigid rules would deny the district court [that] discretion. . . ." 765 F.2d at 1333.

The district court awarded damages of $15.00 for each of the following violations of the FLCRA: 1) PVFA's

failure to register as a farm labor contractor; 2) PVFA's failure to provide a written work contract to each plaintiff; 3) the growers' failure to post the terms and conditions of employment at the work site; 4) the growers' failure to maintain wage records; and 5) the growers' failure to provide plaintiffs with wage receipts. The court was careful to outline the considerations that guided it in determining these amounts: Congress' intent in the FLCRA to "cur[e] abuses in the agricultural market"; the substantive impact on plaintiffs caused by defendants' violations; the intentional aspect of defendants' violations; and the impact on the general public that would result from the court's assessment of liquidated damages against the defendants.

The plaintiffs challenge these awards as too low to vindicate their private right of action under the FLCRA. Plaintiffs also argue that the district court improperly labelled the violations as "technical," that the court failed to consider the willfulness of defendants' violations, and that the court erroneously took into consideration the fact that Congress eliminated the plaintiffs' FLCRA claims when it replaced that Act with the Migrant & Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801-1872.[7]

Whether or not we might have been inclined to award greater damages than did the district court for these FLCRA violations, the district court supported its

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[7] 29 U.S.C. § 1802(6), (8)(B)(ii), (10)(B)(iii) excludes "any temporary nonimmigrant alien who is authorized to work in agricultural employment under [H-2] and § 1184 of Title 8" from coverage under the MASWPA.

decision with factors that could properly be considered by it, and we cannot find an abuse of discretion. Although the damages assessed for each violation appear thin when considered separately, we cannot ignore their weight when combined in an award that included damages for other violations; nor can we ignore the fact that these damages were awarded to over 150 persons. The district court was properly concerned with the possibility that an unreasonably excessive damage award might not only punish defendant growers, but might also ultimately harm plaintiffs, individuals whose welfare was linked to that of the Valley's farming industry as surely as was that of the defendants. As we stated in *Beliz*, "the total number of plaintiffs involved, the total number of violations, and the total amount that will be exacted from the delinquent defendant" are all relevant considerations. *Beliz*, 765 F.2d at 1333. Such concerns are part and parcel of the discretion Congress afforded the district courts in assessing FLCRA damages.

Plaintiffs' remaining challenges to the award are also without merit. First, we think the record supports the court's finding that the defendants' violations of the Act were intentional, but the evidence certainly did not compel the court to conclude that the violations were willful. Nor did the court err in considering the MSAWPA or in labelling defendants' violations "technical." The court explained that it considered the MSAWPA mindful that the savings statute of 1 U.S.C. § 109 mandated that "the repeal of the FLCRA should have *no impact* on the bringing of this action," and that it considered the MSAWPA only "to fully determine the actual legislative intent and purpose to be served in this action" (emphasis added).

Finally, the court "stress[ed] that it d[id] not wish to minimize defendants' actions by labelling some of those actions as Technical Violations. . . ." The court explained that it had done so only "in order to set forth th[e] complex and convoluted set of facts in a reasonably comprehensible fashion . . . [and] with the hope that no person [would] employ semantic sport to thwart the clear intent of th[e] Court." We refuse to thwart that intent on appeal, and note that, in any event, consideration of the substantive or technical nature of the violations is entirely proper. *See Beliz*, 765 F.2d at 1333 & n. 72. We affirm the district court's exercise of its discretion in awarding $15.00 in damages for each of defendants' violations of the FLCRA.[8]

-2-

Both parties attack the court's award of $300.00 for defendants' alleged breaches of the work agreement. Before addressing these contentions, we must explain the somewhat unique procedure the district court employed to assess liability and damages once it had determined what defendants' obligations were under the FLCRA and under the work agreement.

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[8] Plaintiffs also complain that the district court erred in failing to hold defendants liable for making false and misleading statements to plaintiffs in violation of 7 U.S.C. § 2044(b)(2). We find no error in this omission because we are not persuaded that the record could support a finding that defendants made such statements. In any event, any damages awarded for breaches of the terms of the work agreement would suffice to compensate plaintiffs for this asserted violation.

Although the parties did not dispute that the PVFA and its grower members had violated the various provisions of the FLCRA described above, they did dispute the extent to which the defendants had violated the terms of their work agreement with the plaintiffs. Moreover, it was conceded by plaintiffs that liability and damages for these breaches, although quite similar, would vary from individual to individual. Because such liability and damages would vary, it appeared that each of the hundreds of Mexican plaintiffs, most of whom could not speak English, would have to testify about his conditions of employment to establish his right to recovery and the damages he had sustained.

All parties were anxious to proceed with the damages phase of the case, yet none wished to pursue this course. Accordingly, the plaintiffs proposed the following approach. Plaintiffs were willing, they explained, to waive their rights to actual damages for breaches of the work agreement and would pursue instead liquidated damages for those violations under the FLCRA.[9] The court could then conduct a brief damages trial in which it would hear testimony from a number of "representative plaintiffs," testimony sufficient to enable the court to determine conditions of employment that would be considered to have been common to all plaintiffs. Based on that testimony, the court could also decide on a sum of liquidated damages that would be appropriate in light of

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[9] Because the court had denied plaintiffs' right to the AEWR, the transportation allowance, and the 3/4 work guarantee, the core of the plaintiffs' contractual claims had been lost; thus this "waiver" was less significant than it would otherwise have been.

the found violations. In short, plaintiffs suggested that the parties could avoid the difficulties of specific proof because the court need not determine actual damages for each plaintiff nor determine the particular conditions of employment that each faced. The court could instead extrapolate from the proof offered by the representative plaintiffs at the damages trial and award the damages so determined to the remaining plaintiffs on the basis of evidence developed in discovery – primarily, plaintiffs' answers to defendants' interrogatories.[10]

The court adopted and followed plaintiffs' suggested procedure in determining damages for breaches of the work agreement. After three days of testimony and considering motions for summary judgment by both parties which the court described as supported by "voluminous proof," the court found that defendants breached their employment agreement as to those plaintiffs who were employed on a piece rate basis in three ways: 1) failing to pay plaintiffs a minimum wage; 2) failing to provide plaintiffs free tools; and 3) making unauthorized deductions from plaintiffs' wages. The court then decided that the sum of $300.00 was proper liquidated damages for

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[10] Under plaintiffs' proposal, both parties would submit motions for summary judgment following the damages trial. These motions were to provide a means not only for plaintiffs to show, based on sworn evidence (the sworn answers to interrogatories) that those not testifying at the trial were similarly situated to those who testified, but also for defendants to point out, with the same sort of evidence or with affidavits, any plaintiff who was not similarly situated to the representative plaintiffs.

those violations and awarded that amount to each plaintiff whose answers to defendants' interrogatories showed him to be a piece rate worker.[11]

Both parties attack the award. Plaintiffs complain that the sum of $300.00 is too low, that it does not compensate them for a number of violations proved at the damages trial, and that the award was improperly limited to piece rate workers. Defendants attack the damage award because nearly all the plaintiffs who received it recovered on the basis of their answers to defendants' interrogatories. Defendants argue that they never consented to try damages on this basis and that the interrogatories are hearsay which cannot support an award of damages.

Although we would not otherwise question the sum of $300.00 as too low, we agree with plaintiffs that the district court inexplicably omitted from its liability findings and damage award a number of asserted violations[12] and that the court did not explain its basis for limiting that award to piece rate workers. We do not resolve these issues but rather vacate the damages award so that the district court can address them on remand. The court will have to reassess its award, in any event, to determine the

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[11] Only seventeen of the 159 plaintiffs whose claims were not barred by limitations were not employed on a piece rate basis; thus the overwhelming majority of the plaintiffs who recovered were awarded $375.00.

[12] These include primarily plaintiffs' claim that the defendants breached their obligation to provide insurance coverage for the H-2 workers.

changes to be made in the award, if any, in light of our conclusion that the 3/4 work guarantee and $5.00 transportation allowance were part of the work agreement, and we think these other issues can best be addressed at that time.[13]

More fundamentally, we agree with the defendants that the award cannot stand because there was no consent to the procedures employed to assess liability and damages. We recognize that the district court faced a difficult problem, given the number of parties involved and the complexity of the case, and that the procedure followed was a useful means of resolving those difficulties fairly and expeditiously. The procedure founders, however, for lack of evidence in the record that the defendants either understood or agreed to it. Indeed, we confess that we are not fully confident that our understanding of the procedures employed is what the plaintiffs intended, although we believe our interpretation accurately reflects what the district court intended to accomplish. These questions are best resolved on remand where the procedures to be used to determine liability and damages for the breaches of the work agreement can be formalized in a pre-trial order consented to by all of the parties.

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[13] Defendants argue that because at the liability/damages trial plaintiffs sought liquidated damages under the FLCRA rather than actual damages, plaintiffs have waived their rights to any actual damages, including damages for the 3/4 work guarantee and the $5.00 transportation allowance. We leave this matter for the district court to resolve in the first instance on remand.

V

The next set of issues pertain to the district court's refusal to certify as a class under Fed.R.Civ.P. 23(b)(3) the 809 workers for whom the defendants obtained visas. In the event that we affirm the court's refusal to certify the class, plaintiffs ask us to reverse the court's determination that a number of plaintiffs are barred by limitations. Before addressing these issues, we should explain the convoluted procedural history behind this case.

*Salazar v. PVFA* is, in fact, four separate actions by H-2 workers in the Western District of Texas that were consolidated prior to trial: *Lara v. PVFA* (six plaintiffs); *Salazar v. PVFA* (251 plaintiffs); *Primero v. PVFA* (251 plaintiffs – the same plaintiffs as in *Salazar*); and *Zuniga v. PVFA* (235 plaintiffs). *Lara*, the first action brought, was filed as a class action in the El Paso division in April 1979 on behalf of all 809 Mexican nationals who worked under the H-2 program in 1977. The El Paso court denied class certification on March 30, 1981. Plaintiffs then filed the *Salazar* and *Primero* actions in the Pecos division, each suit naming the same 251 plaintiffs, all of whom were members of the putative class in *Lara*. The only difference in *Salazar* and *Primero* were the claims made; one alleged breaches of the FLCRA, and the other alleged causes of action in contract. Plaintiffs attempted to bring both suits as class actions, suggesting the same class denied in *Lara*, but the district court denied class certification on February 2, 1982. Two days later, 235 additional members of the putative class moved to intervene in the *Salazar/Primero* cases, but the court denied intervention. These 235 individuals then filed a separate complaint, the *Zuniga* action, in the Pecos division, alleging the same causes of action

brought in *Salazar/Primero*. The *Lara* case was transferred from the El Paso division to the Pecos division, and the court consolidated all four cases under the *Salazar* heading.

-1-

Plaintiffs complain that the Pecos court erred in refusing to certify the class. The court cited as its reasons the same reasons given by the El Paso court that denied certification in *Lara:* (1) common questions of law and fact did not predominate because the plaintiffs' claims varied with the employment conditions each faced; and (2) a class action was not necessarily the superior method for handling the controversy. Plaintiffs complain that common issues did predominate and that the court ultimately handled *Salazar* as if it were a class action, therefore demonstrating that its initial refusal to certify the class was an abuse of discretion.

We disagree. The district court has broad discretion in determining whether or not to certify a class under Rule 23. *See, e.g., Califano v. Yamasaki,* 442 U.S. 682, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979); *Danner v. United States Civil Service Comm'n,* 635 F.2d 427, 433 (5th Cir.1981). As explained in *Richardson v. Byrd,* 709 F.2d 1016, 1019 (5th Cir.), *cert. denied,* ___ U.S. ___, 104 S.Ct. 527, 78 L.Ed.2d 710 (1983):

> Under Rule 23 the district court is charged with the duty of monitoring its class decisions in light of the evidentiary development of the case. The district judge must define, redefine, subclass, and decertify as appropriate in response to the progression of the case from assertion to facts. We recognize that these

> complex cases cannot be run from the tower of the appellate court given its distinct institutional role and that it has before it printed words rather than people. It follows that class certification decisions must be protected by a level of review that accords substantial discretion. At the same time we keep in mind that while Rule 23 is not self defining and employs sometimes internally overlapping indexes, it is, nonetheless, a rule with limits both internal to the rule and without.

It is in this spirit, one that accords the trial court decision the substantial discretion which is its due, that we review the court's refusal to certify the class in this case.

We find no abuse of discretion here. Although the court subsequently treated the case almost as if it were a class action, it did so only upon the asserted agreement of the parties when faced with liability and damages issues which, although similar, were concededly individual. That the court agreed to proceed on this basis does not suggest that its initial determination that common issues in the suit did not predominate was incorrect, and certainly does not make that earlier decision an abuse of discretion.

Although we affirm the district court's refusal to certify the class, we in no way restrict the court's discretion to change that decision on remand. It is well settled that decisions on class certification are always interlocutory. *See, e.g., Elster v. Alexander,* 608 F.2d 196, 197 (5th Cir.1979) ("The district court has a continuing power under Fed.R.Civ.P. 23(c)(1). The certification decision 'is not irreversible and may be altered or amended at a later date,' " *quoting* 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1785 at 137 (1971)).

The district court refused to award damages to any of the *Zuniga* plaintiffs, reasoning that all of those individuals' claims were barred by limitations. The district court noted that Congress did not set any statute of limitations for damage actions under the FLCRA, hence it applied the Texas statute of limitations for analogous types of actions. *See Chevron Oil Co. v. Huson*, 404 U.S. 97, 104, 92 S.Ct. 349, 354, 30 L.Ed.2d 296 (1971) ("[W]hen a federal statute creates a wholly federal right but specifies no particular statute of limitations to govern actions under the right, the general rule is to apply the state statute of limitations for analogous types of actions."). The court correctly determined the most analogous Texas statute to be Tex.Rev.Civ.Stat.art. 5526 § 4, which at the times pertinent here, imposed a limitations period of two years on "actions for debts . . . not evidenced by a contract in writing." The court then applied *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983), which holds that the statute of limitations for putative class members is tolled pending a decision on class certification, *see id.* 103 S.Ct. at 2397, and ruled that limitations were tolled for all 809 workers during the time that elapsed between the date *Lara* was filed and the date the El Paso court denied class certification in *Lara*. According to the court's calculations, the claims of all of the plaintiffs in the *Zuniga* group were time-barred even considering the time added to limitations by tolling.

Plaintiffs argue on appeal that under *Crown* limitations tolled as well during the ten months when class certification in *Salazar/Primero* was pending, thus making the limitations period long enough to include all of the

*Zuniga* plaintiffs. *Crown's* tolling principle applies, plaintiffs argue, not only for the first class certification petition filed but also for any subsequent petitions involving the same class. We are not persuaded. Plaintiffs have no authority for their contention that putative class members may piggyback one class action onto another and thus toll the statue of limitations indefinitely, nor have we found any. To the contrary, it has repeatedly been noted that "the tolling rule [in class actions] is a generous one, inviting abuse," *see id.* at 2398 (Powell, J. concurring); *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 561, 94 S.Ct. 756, 770, 38 L.Ed.2d 713 (1974) (Blackmun, J., concurring), and to construe the rule as plaintiffs would have us presents just such dangers. Given the particular facts here, we decline the invitation.

Plaintiffs correctly point out, however, that the district court made certain miscalculations in determining when limitations expired. The court stated that class certification was denied in *Lara* on March 21, 1981 and that the *Zuniga* complaint was filed on April 2, 1982, when in fact the correct dates are March 30, 1981 and March 2, 1982, respectively. These corrections indicate that the district court's calculations are off by 39 days. Since the court concluded that limitations expired for the *Zuniga* plaintiffs on May 9, 1978, and the last workday for any of the plaintiffs was April 30, 1978, this correction may alter its decision on which *Zuniga* claimants are time-barred. Accordingly, we vacate the court's decision on limitations so that it may calculate anew the limitations deadline applicable for the *Zuniga* claimants.

VI

Finally, plaintiffs complain on appeal that the district court's judgment contained errors of law as well as clerical error with respect to the damages awards. The primary dispute concerns the district court's refusal to award damages to eighty-nine plaintiffs who were not named in the *Lara, Salazar,* or *Primero* complaints but who moved for judgment after the liability/damages trial based on their answers to defendants' interrogatories. The district court permitted recovery by only those plaintiffs who were both named in one of the four complaints and who had also filed answers to the interrogatories. Plaintiffs contend that the district court should have allowed their counsel to add those individuals to the pleadings under Fed.R.Civ.P. 15(b) on the ground that the case had been tried by consent with respect to them.

We are not persuaded. Rule 15(b) permits amendments where issues not raised by the pleadings are in fact tried by the express or implied consent of the parties. *See, e.g., American Standard Credit v. National Cement Co.,* 643 F.2d 248, 257 n. 4 (5th Cir.1981). *See generally* 6 C. Wright & A. Miller, Federal Practice and Procedure § 1493 (1971). Although the rule is a generous one which effects the desirable policy of bringing pleadings in line with issues that actually were developed at trial, we do not think it should be construed here to encompass individuals who were not named plaintiffs in any of the four consolidated cases. The liability trial conducted with representative plaintiffs and defendants was not sufficient to apprise defendants that they were litigating claims of individuals other than those named in the four complaints. The court

was therefore within its discretion in refusing plaintiffs' post-judgment offer to amend their pleadings.

It appears, however, that defendants conceded below that at least nine of the 89 individuals were named in one of the four complaints.[14] We vacate the district court's judgment insofar as it denied recovery to those individuals and remand so that the court can determine the damages to which those plaintiffs are entitled.

It also appears that the names of fifteen other individuals may have appeared in one of the four complaints in slightly altered spellings. For example, Amado Salazar Hurtado filed interrogatory answers and a similar name, Alfredo Salazar Hurtado, appears in the *Salazar* complaint. The names do not match precisely, but given that the names in the captions and interrogatories were in most cases either transcribed from the signatures of functionally illiterate clients or transcribed phonetically in the process of individual interviews, we think some leeway is appropriate. At the least, plaintiffs should be permitted to offer additional evidence on these individuals.[15] We

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[14] These individuals are:

| | |
|---|---|
| Ansires Grado | Isidro Hernandez |
| Francisco Ontiveros Lara | Isael Tercero |
| Baudilio Rivas Gardea | Evangelina Tavarez |
| Patricio Herrera Carreon | Rigoberto Diaz Franco |

[15] These individuals answered interrogatories under the following names:

(Continued on following page)

vacate the judgment as to them so that the district court can consider this issue if the plaintiffs can in fact come forward with such evidence.

Plaintiffs also argue that the district court erroneously listed as *Zuniga* plaintiffs fourteen individuals[16]

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(Continued from previous page)

| | |
|---|---|
| Luis Anaya Terrazas | Eleazar Peregrino Martinez |
| Jesus Avila Lara | Gilberto Tercero Galindo |
| Librado Gallegos Urias | Huberto Saenz Gonzalez |
| Amadina Guzman Astorga | Amado Salazar Hurtado |
| Dionisio Licon Galindo | Carmen Aguirre Acosta |
| Joaquin Ortiz Olivas | Miguel Hernandez Lujan |
| Benjamin Peregrino Martinez | Jesus Manuel Contreras |
| | Leonardo Ovalle Valles |

[16] These individuals are listed in the *Salazar* complaint as:

Maximo Cabrera Lopez
Jorge Hinojosa C.
Manuel Guzman
Cruz Hinojos de Leon
Jose Mercedes Rivera
Guadalupe Sanchez
Teodoso Vasquez Mata
Joaquin Otilio Villalobos H.
Antonio Salazar
Antonio Olivas Ramirez
Ramon Aquirre Hernandez
Bertha Rodriquez Romero
Matilda Olivas Rodriquez

Marcelino Olivas Rodriguez, one of the 6 original *Lara* plaintiffs, should also be included in this group.

whose names are similar to names in the captions in both *Salazar* and *Zuniga*, and that the court erroneously listed three workers[17] as non-piece rate workers whose interrogatories showed them to be piece rate workers. These complaints appear to have merit. We vacate the district court's judgment as to these plaintiffs as well so that the district court can resolve these disputes in the first instance.

Finally, plaintiffs point out that the district court inadvertently failed to include in its judgment an award of $600.00 for attorney's fees. This omission was error and should be cured on remand.

VII

To summarize, we affirm the district court's determination that the AEWR of $2.83 per hour was not one of the terms of plaintiffs' employment agreement but reverse its determination that the 3/4 work guarantee and a $5.00 weekly transportation allowance were not part of that agreement. We affirm the district court's holding that PVFA was a farm labor contractor, that PVFA was a joint employer of plaintiffs, and that PVFA and the growers intentionally violated the FLCRA. We also affirm the liquidated damages awarded by the district court for defendants' breaches of the FLCRA. Because we have concluded that additional terms were part of the work

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[17] These individuals are:

Matias Hinojos Rey
Severiano Hinojos Quinonez
Cecilio Soto Perez

agreement, however, we vacate the award of damages for defendants' alleged breaches of the agreement and remand so that the district court can award damages for those terms and so that it can consider the parties' other complaints about the award.[18] We affirm the court's denial of class certification and its decision on limitations, but order a recalculation of limitations for the *Zuniga* plaintiffs. Finally, we vacate the judgment as to the plaintiffs listed in notes 14-17 so that the district court can correct possible clerical and other errors in the judgment.

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND REMANDED.

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[18] The district court should first address the defendants' argument that plaintiffs have waived their rights to actual damages. If there has been such a waiver, the court may nevertheless find it appropriate to vacate its liquidated damages award for the violations of the work agreement and reassess liability and damages in light of these additional terms.

**EXHIBIT F**

**765 F.2d 1354**

**PRESIDIO VALLEY FARMERS ASSOCIATION,**
**Plaintiff-Appellee,**
**Cross-Appellant,**

**v.**

**William E. BROCK, Secretary of Labor, and U.S. Department of Labor, et al.,**
**Defendants,**

**Antonio Montelongo, et al.,**
**Defendants-Intervenors-Appellants,**
**Cross-Appellees.**

**No. 84-1432.**

United States Court of Appeals,
Fifth Circuit.

July 25, 1985.

Mexican nationals employed by farmers association and its grower members during the 1978 harvest season complained of numerous violations of the Farm Labor Contractor Registration Act and of breaches of the promised terms of employment. The United States District Court for the Western District of Texas, at Pecos, Lucius Desha Bunton, III, J., entered judgment in favor of the workers, and both sides appealed. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that: (1) grower members of the association were not jointly and severally liable with the association, since the "joint employer" theory was not a predicate for imposing liability on the individual members, nor were the individual growers responsible for FLCRA damages assessed against the association on the ground that the violations were committed by them as agents of the corporation, nor could liability of the grower members be predicated on a

late claim that the corporate form of the association was a "sham," and (2) there were two violations of the FLCRA for which the individual defendants, although they are not farm labor contractors, could be liable, viz., failure to ensure that the association was registered with the Department of Labor as a farm labor contractor, and failure to maintain wage records; accordingly, on remand, the workers were entitled to seek damages from the grower members for any such violations, but only on an individual basis – each worker from his employer.

Affirmed in part, reversed in part, vacated in part and remanded.

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Texas Rural Legal Aid, Inc., David G. Hall, Weslaco, Tex., and Edward J. Tuddenham, Hereford, Tex., for defendants-intervenors-appellants, cross-appellees.

Thomas Bacas, Washington, D.C., for plaintiff-appellee, cross-appellant.

Appeals from the United States District Court for the Western District of Texas.

Before THORNBERRY, RUBIN and HIGGINBOTHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Some 250 Mexican nationals employed by the Presidio Valley Farmers Association and its grower members during the 1978 harvest season complain of numerous violations of the Farm Labor Contractor Registration Act and of breaches of the promised terms of employment.

The workers prevailed below and both sides appealed. Most of the issues presented to us were resolved in *Salazar v. PVFA*, 765 F.2d 1334 (5th Cir.1985), a related case we decide today, and we answer them with reference to that decision. Two issues are not identical to those presented in *Salazar*. On those points we vacate and remand the district court's award of damages for breaches of the work agreement and reverse the judgment below insofar as it was assessed against the individual growers jointly and severally for the FLCRA violations of the PVFA.

I

This appeal is a sequel to *Salazar* and we reference the statement of facts set out in that opinion. We add only the following paragraphs which describe additional circumstances relevant to this appeal.

In the winter and spring of 1978, while PVFA and its members were still employing Mexican nationals who held H-2 visas issued in June 1977, the Association began plans to obtain labor for the 1978 harvest. PVFA was essentially the same organization it had been before, except that in November 1977, it incorporated as a non-profit corporation under the laws of the State of Texas. The stated purpose of PVFA was, as before, "to contract for and obtain migrant labor for the use of its members."

The Department of Labor again refused to certify PVFA's petitions to import alien labor, and this time the INS declined to issue the visas without certification. Agents from DOL had investigated the work conditions provided in the 1977 harvest season and had reported

numerous violations of the conditions of employment required by its H-2 regulations. In the face of such abuses, INS was unwilling to issue the requested visas.

By May of 1978 PVFA and its grower members were desperate for harvest workers. Claiming that the Valley's onion crop was "rotting in the fields," PVFA petitioned the federal district court in El Paso on behalf of its grower members and sought an injunction requiring DOL to issue certification for the requested workers and requiring INS to issue visas for them. The court issued the injunction, but conditioned its issuance on PVFA's compliance with the minimum terms of work required by DOL's H-2 regulations. These terms included a 3/4 work guarantee, a wage of $2.97 per hour, a $5 per day housing allowance, an $8 per week transportation allowance, and a promise to pay travel expenses for all workers who travelled into the area from outside Presidio/Ojinaga. In 1978 these conditions of employment were codified at 20 C.F.R. § 655.200 *et seq.*

Shortly thereafter, two H-2 visa recipients, Estaban [sic] Zuniga and Melquiades Lara, sought to intervene in the injunction suit to assert a counterclaim against PVFA on behalf of a class composed of all H-2 workers certified under the 1978 petitions. The intervenors alleged that despite the conditions imposed by the district court when it issued its injunction, PVFA and its grower members were not honoring the terms and conditions of employment required by the H-2 regulations. The intervention petition was not granted until March 18, 1981, and approximately one year later, the case was transferred to the Pecos division, the court that was handling *Salazar.*

Both cases involved many of the same parties. In December 1982 the court granted the workers leave to amend their counterclaim to allege violations of the FLCRA and to add as defendants PVFA's member growers.[1] The charges made in the counterclaim were substantially the same as those made in the complaint in *Salazar,* and the court handled the two cases in a similar fashion.

As in *Salazar* the workers' petition for class certification was denied on the basis that common issues did not predominate with respect to liability and damages, and the case therefore proceeded with some 250 named intervenors.[2] Although the court did not need to determine the terms and conditions of the employment agreement as it had in *Salazar,*[3] it utilized an identical procedure to that used in *Salazar* to determine liability and damages for the breaches of the FLCRA and the work agreement. In fact, the liability/damages trial described in *Salazar* was the same trial used to assess liability and damages in the instant case. The court also considered motions for summary judgment analogous to those filed in *Salazar,* motions supported by the workers' answers to defendants' interrogatories

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[1] For convenience sake we will refer to counterclaim defendant PVFA and its members as "defendants."

[2] Only two workers had initially intervened and brought counterclaims against PVFA, but the court allowed some 248 Mexican workers to join the case as intervenors.

[3] Those conditions were set when the El Paso court, in granting PVFA's requested injunction for the issuance of the H-2 visas, ordered it to comply with DOL's H-2 regulations.

As in *Salazar*, the workers did not seek actual damages and instead requested the court to award liquidated damages under the FLCRA both for the violations of that act and for defendants' breaches of the work agreement. The damages awarded by the district court were, for the most part, identical to those determined in *Salazar*. The court assessed liability and damages against PVFA and its grower members jointly and severally for all of the found violations of the FLCRA and breaches of the work agreement.

Both sides appeal, raising many of the same issues we resolved in *Salazar*. The workers' complaints abut the damages award for breaches of the work agreement differ slightly from those made in *Salazar*, and defendants bring one additional point, arguing that because PVFA was incorporated under Texas law in 1978, its individual members cannot be held vicariously liable for the damages assessed against PVFA.

II

We address first those issues in this appeal that are controlled by our decision in *Salazar*. That case disposes of the workers' complaints regarding the court's liquidated damages awards of $15.00 for the various violations of the FLCRA and those regarding the court's refusal to certify as a class under Fed.R.Civ.P. 23(b)(3) the H-2 workers employed during the 1978 harvest season.[4]

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[4] We also reject the workers' claim that the district court erred in failing to hold defendants liable for making "false and

(Continued on following page)

*Salazar* also forecloses defendants' claims that PVFA did not function as a farm labor contractor, that it did not function as a farm labor contractor with respect to these workers, and that its violations of the FLCRA were not intentional.[5]

III

Both the workers' and the defendants' complaints about the district court's damage award for breaches of the work agreement are similar to those made in *Salazar*. The workers complain that the district court erred in refusing to award damages for defendants' breach of the 3/4 work guarantee and in limiting the award to those workers employed on a piece rate basis. Defendants again challenge the trial/summary judgment procedure employed by the court to determine liability and damages.

As in *Salazar*, we vacate the award of damages for breaches of the work agreement so that the district court can make findings on defendants' liability for the asserted breaches of the 3/4 work guarantee and the damages, if any, to be awarded for that breach. The court

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(Continued from previous page)

misleading statements" about the terms and conditions of employment for the reasons stated in note 8 of our opinion in *Salazar*.

[5] As for the complaints by both parties that the district court erred in determining that certain intervenors were or were not entitled to the housing allowance, we conclude that the district court's determinations were based on factual findings which are not clearly erroneous.

should explain as well its basis for awarding no damages to non-piece rate workers for the alleged breaches of the work agreement. Finally, on remand the court should obtain express consent from all counsel on the procedures to be followed in assessing liability and damages for the breaches of the work agreement.

IV

The district court made no distinction between PVFA and its members when it assessed liability and damages in the instant case. The court rejected defendants' complaints that the workers should not have been permitted to amend their counterclaim to add the individual growers as defendants[6] but did not address the additional defense that the growers could not be held liable under the FLCRA for what PVFA, the corporation, had done. The court simply stated: "PVFA breached statutory and regulatory duties imposed by FLCRA during [the 1978] growing season, and . . . the individual dues paying members of PVFA were jointly responsible for the statutory damages resulting from the violations. . . ."

On appeal the individual grower defendants reassert the argument made below that, under Texas law, "the members of a non-profit corporation shall not be personally liable for the debts, liabilities, or obligations of the corporation." Tex.Rev.Civ.Stat.Ann. art. 1396-2.08(E). Because PVFA was the only farm labor contractor in this

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[6] We conclude that the district court was within its discretion in permitting intervenors to so amend their counterclaim under Fed.R.Civ.P. 15(c).

case, to the extent the damages the district court awarded were based on violations of the FLCRA which could have been committed only by a farm labor contractor, the individual growers cannot be held responsible for them.

The workers offer three theories for holding the members of PVFA jointly and severally liable with the Association: that the individual members are liable for the damages under the "joint employer" theory applied in *Salazar*; that the individual members of PVFA are liable for its violations on the ground that the violations were tortious acts committed personally by the individual members; and that the PVFA was a sham corporation. We are not persuaded by any of these arguments.

1

The "joint employer" concept applied in *Salazar* cannot help the workers here. In *Salazar* the PVFA was held liable under the FLCRA for its violation of its statutory obligations under the Act as well as for the growers' breaches of the workers' employment agreement. The first set of obligations was triggered by PVFA's status as a farm labor contractor, and the obligation to honor the work agreement by PVFA's status as a farm labor contractor who jointly employed the workers with the member growers. The FLCRA expressly imposed both sets of obligations on the Association, but only because the PVFA first met the statutory requirements which made it a farm labor contractor.

As we explained in *Beliz v. McLeod & Sons Packing Co.*, 765 F.2d 1317 (5th Cir.1985), the FLCRA provides separate sets of obligations for contractors and growers.

*Id.* at 1331. We there concluded that, given the Congressionally imposed division of responsibility between these parties, a grower could not be held vicariously liable for the FLCRA violations of a farm labor contractor who also functioned as the grower's agent. For the same reasons, the "joint employer" concept cannot support the district court's imposition of joint and several liability on the growers for *PVFA*'s omissions. Such joint responsibility would effectively negate the statutory distinctions we preserved in *Beliz*.

2

Nor are the individual growers responsible for the FLCRA damages assessed against PVFA on the ground that the violations were committed by them as agents of the corporation. We recognize that a corporation's violations of certain statutory duties have been held to be tortious in nature, *see, e.g., Rohm & Haas Co. v. Dawson*, 557 F.Supp. 739, 818 (S.D.Tex.1983), *rev'd on other grounds*, 722 F.2d 1556 (Fed.Cir.1983), and that corporate officers can be held liable for such violations if they personally participate in them or direct others to carry them out, *see, e.g., L.C.L. Theatres v. Columbia Pictures, Inc.*, 619 F.2d 455 (5th Cir.1980), but we need not inquire whether the statutes and acts at issue here trigger such liability. The workers have not made sufficiently specific allegations or proof to support the theory.

The workers ask us to affirm the imposition of joint and several liability on *all* of the growers for *all* of the found violations of the FLCRA by the PVFA on a theory which, by its very nature, requires individualized proof.

Even if we assume that each of the grower members violated the terms of the workers' employment agreement, such actions would render the individual defendants liable only to those workers they employed, not to workers employed by others. Having eschewed individual proof for a trial on liability and damages based on the testimony of "representative" H-2 workers and only a few of the individual defendants, the workers have not created a record that will support the proffered theory.

3

The workers raised too late the only theory for joint and several liability that has arguable merit – that the grower members are personally liable because the corporate form of PVFA was a "sham." If PVFA's corporate veil were pierced, joint and several liability such as that assessed in *Salazar* would be appropriate, but the workers neither pleaded nor tried their case on the sham theory. Indeed, the argument was not raised until the workers filed their Brief in Support of Judgment a month after the liability/damages trial. Absent pleadings and evidence to support the theory or trial by consent, the district court could not have used the sham corporation theory to impose joint and several liability on the growers for the damages assessed against PVFA; nor can we do so on appeal.

V

There are two violations of the FLCRA for which the individual defendants, although they are not farm labor contractors, may be liable: (1) failure to ensure that PVFA

was registered with DOL as a farm labor contractor as required by 7 U.S.C. § 2043(c); and (2) failure to maintain wage records as required by 7 U.S.C. § 2050c. The workers requested damages from the individual defendants for these violations in their amended counterclaim and the record indicates that both requirements may have been violated. Accordingly on remand the workers are entitled to seek damages from the growers for any such violations, but only on an individual basis – each worker from his employer. The growers are not jointly and severally liable for these violations. Nor are the individual grower defendants liable for the breaches of the work agreement, because the workers have pursued that claim only against PVFA.[7] Indeed, the workers could not recover such damages against the individual defendants under the FLCRA because 7 U.S.C. § 2044(b)(4), which requires an agricultural employer to abide by the terms of his work agreement, applies only to agricultural employers who are also farm labor contractors.

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[7] The workers have waived such individual contract claims if those claims were ever asserted. They state in note 4 of their reply brief:

> [Intervenors] did not contend [below] and do not now that the individual growers were parties in a suit to enforce separate employment relationships with the individual employees on their farms. The counter-claim was directed at the employment relationship between [the workers] and PVFA; the individual growers were parties to the suit in their capacity as members of PVFA, jointly and severally liable for the employment relationship entered into by PVFA, not for any "separate employment relationship with their individual employees."

VI

In sum, we reference *Salazar* for our resolution of all issues in this appeal save two. The damages award for breaches of the work agreement is vacated and remanded for redetermination, and all damages awards by the court are reversed to the extent they impose joint and several liability on the individual grower defendants for the FLCRA violations of PVFA.

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART AND REMANDED.

**EXHIBIT G**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
PECOS DIVISION

| | | |
|---|---|---|
| AMADO SALAZAR, et al.,<br>Plaintiffs | * | |
| V. | * | P 81 CA 23 |
| PRESIDIO VALLEY FARMERS ASSOCIATION, et al.,<br>Defendants | * | ORDER CERTIFYING CLASS<br><br>(Filed 4-18-86) |

On the 17th day of April, 1986 came on before the Court Plaintiffs' motion for class certification. The Court having carefully considered the briefs of counsel and the extensive record in this case finds that the Plaintiffs have satisfied all of the requirements of Rule 23(a), and further finds that certification is appropriate under Rule 23(b)(3) because questions of law and fact common to the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of this controversy. It is therefore,

ORDERED that this action shall proceed as a Rule 23(b)(3) class action on behalf of the class defined as:

> All workers who received H-2 visas to perform farm work for the Presidio Valley Farmers Association at any time between June 9, 1977 and April 30, 1978.

It is further ORDERED that Amado Salazar-Calderon, Melquiades Lara-Vargas, Victoriano Galindo, Patricio Herrera-Carreon, and Esteban Zuniga-Tarin shall be

designated to act as representatives of the class. In the interests of manageability, the remaining named plaintiffs in these consolidated actions will now be treated as class members rather than class representatives.

It is further ORDERED that plaintiffs shall provide notice to the members of the class by mailing the attached notice and claim form to the last known address of each member of the class for whom addresses exist (excluding those class members who have previously been named plaintiffs in these actions as those persons are obviously aware of the action). In addition, plaintiffs shall provide notice to the class by having the attached notice read over XEOJ radio in Ojinaga, Chihuahua at least 7 times per week for 3 weeks following the entry of this order.

It is further ORDERED that all class members who wish to recover damages shall file proof of their claim with the Court no later than the 31 day of May, 1986, as directed in the attached notice. The answers to interrogatories previously filed in this case by H-2 workers shall suffice as proof of claims for purposes of this requirement. Any class member who has not filed a proof of claim with the Court by the 31 day of May, 1986, shall be deemed to have waived his or her right to recover damages for the violations alleged in this action. Filing of a proof of claim shall not automatically entitle class members to recovery as Defendants shall retain the right to challenge any disputed claims.

Done this 17 day of April, 1986.

/s/ _____
Lucius D. Bunton
United States District Judge

**EXHIBIT H**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
PECOS DIVISION

| | | |
|---|---|---|
| PRESIDIO VALLEY FARMERS ASSOCIATION, et al., Counterclaim Defendants | * | P-82-CA-15 |
| V. | * | ORDER |
| ANTONIO MONTELONGO, et al., Counter Plaintiffs | * | CERTIFYING CLASS |
| | * | (Filed 4-18-86) |

On the 17th day of April, 1986 came on before the Court Counterclaim Plaintiffs (hereafter Plaintiffs) motion for class certification. The Court having carefully considered the briefs of counsel and the extensive record in this case finds that the Plaintiffs have satisfied all of the requirements of Rule 23(a), and further finds that certification is appropriate under Rule 23(b)(3) because questions of law and fact common to the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of this controversy. It is therefore,

ORDERED that this action shall proceed as a Rule 23(b)(3) class action on behalf of the class defined as:

> All workers who performed farm work for any member of the Presidio Valley Farmers Association at any time between May 17, 1978 and April 30, 1979.

It is further ORDERED that Melquiades Lara-Vargas, Victoriano Galindo, Patricio Herrera-Carreon, and

Esteban Zuniga-Tarin shall be designated to act as representatives of the class. In the interests of manageability, the remaining named plaintiffs in these consolidated actions will now be treated as class members rather than class representatives.

It is further ORDERED that plaintiffs shall provide notice to the members of the class by mailing the attached notice and claim form to the last known address of each member of the class for whom addresses exist (excluding those class members who have previously been named plaintiffs in these actions as those persons are obviously aware of the action). In addition, plaintiffs shall provide notice to the class by having the attached notice read over XEOJ radio in Ojinaga, Chihuahua at least 7 times per week for 3 weeks following the entry of this order.

It is further ORDERED that all class members who wish to recover damages shall file proof of their claim with the Court no later than the 31 day of May, 1986, as directed in the attached notice. The answers to interrogatories previously filed in this case by H-2 workers shall suffice as proof of claims for purposes of this requirement. Any class member who has not filed a proof of claim with the Court by the 31 day of May, 1986, shall be deemed to have waived his or her right to recover damages for the violations alleged in this action. Filing of a proof of claim shall not automatically entitle class members to recovery as Defendants shall retain the right to challenge any disputed claims.

Done this 17 day of April, 1986.

/s/ _____
Lucius D. Bunton
United States District Judge

**EXHIBIT I**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

| | | |
|---|---|---|
| AMADO SALAZAR-CALDERON, et al. | § | |
| v. | § | NO. P-81-CA-23 |
| PRESIDIO VALLEY FARMERS ASSOCIATION, et al. | § | |
| PRESIDIO VALLEY FARMERS ASSOCIATION, et al. | § | NO. P-82-CA-15 |
| v. | § | |
| ANTONIO MONTELONGO, et al. | § | |

*MEMORANDUM OPINION AND ORDER*
(Filed Jun 18 1987)

In long and tortuous proceedings, this cause came on to be tried by this Court without a jury in Pecos and Marfa, Texas, in June, July, and October of 1986, and in January and March of 1987. Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, the Court hereby enters its Findings of Fact and Conclusions of Law.

## PRELIMINARY REMARKS

The Judgment being entered on this date is much too long. The facts deduced during the same 17 trial days resulted in a myriad of information which, when reduced to a bare minimum, still results in such a thick Judgment

and Transcript that it will scare counsel and any appellate judge that is assigned to this case. There is no way, in view of the direction previously given by the Fifth Circuit Court of Appeals, that the trial of this case could have been shortened. It was necessary to take the testimony of some 500 plus Plaintiffs and 20 to 30 individual Defendants.

The judgment cannot and does not reflect the true feeling of the Court. It is with a heavy heart that this Judgment is entered. The Judgment is in excess of a million dollars, and is being assessed against farmers who have worked long, hard, and diligently for many years, fighting flood, drought, bugs, weevils, hail, prices, the government, and many other things in order to put shirts on our backs and produce on our table. The Defendants are friends of the Court. I've known many of the farmers involved for three decades or more, and some of the families involved I have known for over 50 years. I know them to be industrious, hard working individuals.

Circumstances of 1977 and 1978 hopefully will never arise again. In order to prevent crops from rotting in the field, the farmers figuratively "sold their soul to the devil." They agreed to conditions and terms and prices never before agreed upon and never after the word agreed upon either. The statute to which a great portion of the Judgment relates has now been, thankfully, repealed. The situation won't arise again, and is but another chapter in the story of a valley tucked away from the mainstream of the United States. A valley where the farms and technical know-how have been developed on the United States of the Rio Grande and the requisite labor has been provided in the most part by laborers from

the Republic of Mexico. Recognizing that the amount of this Judgment may well result in many of the farmers either going out of business altogether or having to seek some form of bankruptcy, it may well be that the Court will harm laborers in Mexico more in the long run than the tillers of the soil that currently are still farming the Presidio Valley.

This is not to say that the laborer who works in the broiling sun under adverse conditions is not deserving of compensation. Most of the Plaintiffs that gave testimony were poorly clothed - illiterate or functional illiterates - downtrodden - untraveled - and unskilled save to render the backbreaking work required of one who works as a farm laborer. No one could have taken the testimony of these individuals without being touched by their plight and sympathetic for their station in life.

The farmers are not without some blame. Records were either poorly kept - not kept - or fraudulently kept. Many of the farmers set out to and did take advantage of their fellow man. The only reason that could be given for this behavior is that traditionally this had always been the case. Just because it was done wrong in the past does not mean that this wrong should continue.

The Judgment will be explained in the paragraphs immediately following. It should be pointed put that, except in the case where a worker received absolutely nothing for various and sundry reasons,[1] there is an exact

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[1] On page 23, one Otilia Baeza de Enriquez received zero dollars. Otilia worked without a permit. As a consequence, no

(Continued on following page)

amount given. This is so even though there were different farmers, crops, hours and wages.

The lows run from just a few dollars to something in excess of $25,000 for a seriously injured person. The Court is thankful for modern office machinery which will allow the totals to be carried forward and for computers that can print out great gobs of information.

This was not a "fun lawsuit" to try. It was long and tedious for counsel and the Court. The result does not satisfy the Trial Judge, as it works an extreme hardship on the Defendants and might well condemn the children of the plaintiffs to starvation.

## I.
## PROCEDURAL HISTORY

Before proceeding to merits of the issues before this Court, a survey of the procedural history of this case is necessary.

This case presents the claims of myriad Mexican Nationals against the PRESIDIO VALLEY FARMERS ASSOCIATION (PVFA) and its grower members who employed them during the 1977 and 1978 harvest season. The Plaintiffs allege that the Defendants violated the terms and conditions of their employment agreement, and that the Defendants violated numerous provisions of

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damages could be awarded, as one who worked "wet" didn't come under the program.

the Farm Labor Contractor Registration Act (FLCRA), 7 U.S.C. §§ 2041, *et. seq.*

In 1977, the PRESIDIO VALLEY FARMERS ASSOCIATION requested permission from the Immigration and Naturalization Service (INS) to import Mexican farm laborers pursuant to the Immigration Services "H-2 Program." 8 U.S.C. 1101(a)(15)(H)(ii). Eventually, 809 visas, 661 six-month visas, and 148 one-year visas were granted.

In 1978, PVFA again filed for visas, but its application was rejected because of the Association's failure to comply with the required terms of work governing the 1977 visas. In response, the Association filed *Presidio Valley Farmers Association v. Marshall,* EP–78–CA–95 (now P–82–CA–15), to compel INS to issue visas.

The El Paso Division entered an injunction ordering the visas issued by May 24, 1978, on the condition that the growers comply with the work terms set forth in 20 C.F.R. § 655. In July, 1978, ANTONIO MONTELONGO and several Mexican H-2 workers moved to intervene on behalf of a class of workers employed by the Association to counterclaim against PVFA for violations of the 1978 work contract. Later in 1979 and 1981, Mexican H-2 workers who received visas during the 1977 season filed three additional class actions charging PVFA with contract and FLCRA violations.

The cases involving the 1977 season were eventually consolidated under the caption *Salazar v. Presidio Valley Farmers Association,* P–81–CA–23, and the case was transferred to the Pecos Division. The *Montelongo* case, EP–78–CA–95 (now P–82–CA–15) was transferred to the Pecos Division in 1982. The Court denied certification of the

classes in both of the cases, and several hundred individual workers sought to intervene. Thus the case went forward with a large number of individual Plaintiffs.

Because of the large number of parties suing, counsel for both sides agreed to a number of steps to facilitate the Court's decision in the two cases. First, the parties agreed to submit to the Court cross motions for summary judgment so that the Defendant's obligations under the FLCRA, and so the terms and conditions of employment that Defendants were required to offer could be established. The parties stipulated to certain facts and supported their respective motions with documentary proof that had been developed in discovery.

In January 1983, the Court ruled on the cross motions for summary judgment that the terms set forth in the Labor Department's H-2 regulations, 20 C.F.R. § 602.10(1977), applied to the 1977 visas. However, the Court also ruled that the three-fourth work-days guarantee, the payment of daily transportation expenses, and the adverse effect wage of $2.83 were not part of the agreement.

The contract terms applicable during the 1978 season were established by the injunction compelling the issuance of the visas.

After determining liability, the Court ordered a separate trial on the issue of damages. In July 1983, a hearing was held to determine how to resolve the damage issue in the two cases. Because the principal monetary terms of the 1977 contract had been rejected by the Court, the Plaintiffs agreed to waive their remaining actual damage

claims and to pursue only the liquidated FLCRA damages. This agreement was made with the understanding that Plaintiffs would be able to prove their claims for liquidated damages using the testimony of a sample of the individuals who had worked during the two seasons and by using the interrogatory answers filed by the remaining Plaintiffs. Because the Court was under the impression that all the parties before the Court had agreed to this procedure, the Court consolidated the two cases for trial in October 1983. Judgments were entered in both actions in the spring of 1984.

Both parties appealed the Court's rulings in both cases. In the *Salazar* case, the Fifth Circuit affirmed the Court's determination that the AEWR of $2.83 per hour was not one of the terms of the employment agreement. However, the Fifth Circuit reversed the ruling that the three-fourth work-day guarantee and the $5.00 weekly transportation allowance were not part of that agreement. The rulings finding that PVFA was a farm labor contractor and a joint employer of the Plaintiffs, and that the PVFA and the growers intentionally violated the FLCRA were affirmed. The Fifth Circuit also affirmed the liquidated damages awarded for the Defendant's breaches of the FLCRA. This Court's decision regarding the award of damages for the Defendant's breaches of the work agreement was vacated, and the cause was remanded so that this Court could reconsider those damages in lieu of the additional terms the Fifth Circuit found to be part of the work agreement. The Fifth Circuit also directed this Court to correct any possible clerical errors or other errors in the judgment. Finally, the Court of Appeals held that denial of class certification was not an abuse of

discretion, but indicated that this Court could reconsider this issue on remand.

The appellate court made similar rulings in the *Montelongo* case, remanding the breach of agreement claims for retrial, and suggesting reconsideration of the class ruling. In addition, the Fifth Circuit held that in the 1978 case, unlike the 1977 case, the individual members of the by-then incorporated Association, could not be held jointly and severally liable for PVFA's FLCRA violations. With the above mentioned considerations in mind, the Court now turns its attention to addressing the remaining issues in this case.

II.

In footnote 18, on page 1353 of the Fifth Circuit's opinion, this Court was directed to first address the issue of whether the Plaintiffs have waived their right to actual damages. *Salazar-Calderon v. Presidio Valley Farmers Association*, 765 F.2d 1334 (1985). This Court does not believe that the Plaintiffs waived their right to actual damages. In the 1984 damages proceeding, the Plaintiffs agreed to forego their claim for actual damages so that a simplified trial proceeding could be implemented. In 1984, the Court and the Plaintiffs both believed that the Defendants had agreed to the simplified trial proceeding. Given the fact that all the litigants had not agreed to the trial procedures the Court used in 1984, the Court is of the opinion that the Plaintiffs' waiver was of no consequence as it was a conditional waiver. In any case, the Fifth Circuit allowed this Court to decide this issue anew. In Note 18, on page 1353, they stated:

> If there has been such a waiver, the Court may nevertheless find it appropriate to vacate its liquidated damages award for the violations of the work agreement and reassess liability and damages in light of these additional terms.

This Court is of the opinion that, in light of the additional terms of the work agreement, the previous liquidated damages award with respect to the work agreement should be vacated, and that actual damages should be determined. Thus, the liquidated damage award for the violations of the work agreement is hereby VACATED.

In its opinion, the Fifth Circuit left it up to this Court to decide whether or not to reconsider its previous class certification rulings. This issue was reconsidered, and April 17, 1986, this Court certified a class in this cause. The class action device has frequently been approved in suits under the FLCRA. *Almandarez v. Barrett-Fisher Co.*, 762 F.2d 1275 (5th Cir. 1985); *Alvarez v. Joan of Arc, Inc.*, 658 F.2d 1217 (7th Cir. 1981); *Izaguirre v. Tankersley*, 516 F.Supp. 755 (D. Or. 1981). Although a class in this case was certified some five years after this suit was brought in Pecos, the certification was timely. There is no set deadline by which a court must act in certifying a class. *Gore v. Turner*, 563 F.2d 159 (5th Cir. 1977).

As such, this Court reconsidered its previous class certification ruling and ruled that class certification was proper.

In the previous ruling, the claims of the *Zuniga* claimants were held to be barred by limitations. In 1984, this Court calculated that the Plaintiffs could only recover for any of Defendants' actions that violated FLCRA after

May 9, 1978. Since no Plaintiffs worked after April 30, 1978, the *Zuniga* interveners were ruled to be time barred.

The Court of Appeals directed that the limitations deadline applicable to the *Zuniga* claimants should be calculated anew. The Fifth Circuit ruled that the limitations calculations were off by 39 days. According to this figure, the proper limitations deadline is April 1, 1978. The Court is of the opinion that none of the *Zuniga* claimants are time-barred. In addition, it would not be just to exclude the *Zuniga* interveners from a class to which they surely belong. As such, the *Zuniga* claimants are hereby included in the class.

Once the class was certified, the Court set a May 31, 1986 deadline for proof of claim forms to be filed. A number of class members who testified at trial did not file timely claims. The Court is of the opinion that these claims should be allowed despite the fact that their proof of claim forms were filed late. A trial court has great discretion to accept newly filed claims of class members. *Kilgo v. Bowman Transporation, Inc.*, 789 F.23 [sic] 859 (11th Cir. 1986); *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546 (11th Cir. 1986); *Montelongo v. Meese*, 803 F.2d 1341 (5th Cir. 1986).

The Court cannot see how the Defendants can be prejudiced by the inclusion of the late claimants. Their testimony was similar to the other class members, and the Defendants had plenty of time to respond to any of the new claims. Indeed, none of the untimely claimants offered any surprising testimony. Thus, this Court will exercise its discretion and allow the claims that were submitted late.

A related issue concerning what claims are to be allowed involves the issue of surrogate testimony.

A number of the Plaintiffs attempted to prove their claims through surrogate testimony, i.e., the testimony of relatives, fellow workers, and friends. Such testimony has been recognized by the Fifth Circuit as an acceptable method to establish wage claim damages, especially in light of the lowered standard of proof applicable to such claims. "Testimony of some employees concerning the hours worked by groups of non-testifying employees is sufficient if those who do testify have personal knowledge of the work performed by those who do not." *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1331 (5th Cir. 1985); *Castillo v. Givens*, 704 F.2d 181, 195 (5th Cir. 1983); *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 472 (11th Cir. 182 [sic]). The use of co-worker testimony is even more appropriate when class damages are being calculated. The critical requirement is simply that the surrogate have personal knowledge of the non-testifying Plaintiff's work.

The Court was not persuaded by the surrogate testimony of friends. Aside from the surrogate testimony offered by relatives, the Court found surrogate testimony to be without credibility as this testimony was not based on personal knowledge.

Only the surrogate testimony of relatives and family members will be allowed. Therefore, the Court is considering all the claims from class members that filed a proof of claim form, and who testified, either in person or through the surrogate testimony of relatives.

III.

The Fifth Circuit directed this Court to reassess its award in light of the Court of Appeals' conclusion that the 3/4 work week guarantee and the $5 transportation allowance were part of the work agreement. It is clear to the Court that the transportation allowance was not paid to any of the workers, and that, with rare exception, the 3/4 work week guarantee was not complied with. Thus the Court is essentially rehearing this cause to redetermine the Plaintiffs' damages.

To make a through determination, the Court listened to 507 class members, each of whom required the use of an interpreter.

In cases such as this, where liability has been established, an award of damages serves to vindicate public interests as well as to provide private compensation, damages need not be proven with certainty. It is sufficient that the damages be proven as a matter of "just and reasonable inference." *Anderson v. Mt. Clemons Potter Co.* 328 U.S. 680, 687-88 (1946) (FLSA); *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931) (antitrust); *In Re Plywood Anti-trust litigation*, 655 F.2d 627, 635 (5th Cir. 1981) (antitrust); *Pettway v. American Cast Iron Pipe Co.*, 681 F.2d 1259, 1266-67 (1th [sic] Cir. 1982) (Title VII).

The "just and reasonable inference" standard may be met with admittedly inexact or approximate evidence. *Mt. Clemons Pottery*, 328 U.S. at 687; *Reeves v. International Tel. & Tel. Corp.*, 616 F.2d 1342, 1351 (5th Cir. 1980) (damages based on the "rough calculations of [the plaintiff's] subconscious mind affirmed by appellate court.") (Court

had discretion to calculate farm workers' hours from testimony which was a "maze of total and complete confusion"). Once that prima facie showing has been made, the burden shifts to the Defendants "to come forward with evidence to negate the reasonableness of the inference to be drawn from the employees' testimony." *Beliz v. W. H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1330 (5th Cir. 1985).

The Defendants did not offer any evidence to rebut the Plaintiffs' testimony. As this Court pointed out in its first decision, the farmers either lost whatever records they had, or didn't keep records at all. Only in a few instances were records actually kept and retained.

Having listened to over 500 H-2 workers, the Court is of the opinion that the farm workers' claims are credible. Understandably, a clear and detailed recollection of the facts was not possible. Fading memories can do much to cause inaccuracies between what was testified to and what was answered in the interrogatories. Thus, for the most part, the Court is relying on the written responses of the proof of claim forms in assessing the Plaintiffs' damages. A number of factual findings had to be made before the Plaintiffs' damages could be assessed. These findings include:

(a) the duration of the visa period;

(b) the crops grown and duration of each crop activity;

(c) the wage rates paid for each crop activity; (d) the hours and days of work performed by each worker in each crop activity;

(e) the productivity rates of workers employed in piece-rate crops; and

(f) inference to be applied to the testimony and interrogatory answers.

Based upon the testimony heard, and on the answers to the interrogatories, a number of assumptions were made. Those assumptions will be discussed in the following sections of this memorandum.

*The Visa Period*

The testimony is uncontradicted that the 1977 visas were issued on June 9, 1977. Based upon the testimony of INS Agent-in-Charge Doug Keim, it appears that the shorter visas were in effect for a full six months from the date of issue, i.e., until December 9, 1977. The 1977 one-year visas ran from June 9, 1977 until May 24, 1978 (see Temporary Restraining Order, May 18, 1978). This testimony was corroborated by one of the workers who produced his 70-day visa at trial and by the testimony of several one-year workers that their visas expired in the latter part of May 1979.

Plaintiffs' damages are, therefore, based upon the following visa periods:

| *Visa* | *Period* | *Weeks* |
|---|---|---|
| *1977* | | |
| 6-month | June 9, 1977 – December 9, 1977 | 26 |
| 12-month | June 9, 1977 – April 30, 1978 | 47 |
| *1978* | | |
| 70-day | May 24, 1978 – August 2, 1978 | 10 |
| 12-month | May 24, 1978 – May 23, 1979 | 52 |

*Crops Grown and Duration of Crop Activities*

The Defendants' testimony and admissions introduced at the first trial provide a basis for determining what crops were harvested during the visa period and the maximum length of those crop activities (see Appendix B). These findings are necessary since workers occasionally were confused about dates and claimed to have worked in crops which were not harvested during the years in question or claimed to have harvested crops for far longer than was physically possible, e.g., harvesting melons for more than 30 days.

*Wage Rates*

The testimony and documentary evidence in the record establishes that, subject to exceptions that will be discussed below, the growers paid the following rates:

*Melons* (harvesting, weeding, and straightening):

1977: $2.20/hour

1978: $2.97/hour

*Onion Harvesting:*

1977: $0.35/ bushel

1978: $0.40 or $0.45/bushel[2]

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[2] In the damages calculation program used for the Judgment in the *Montelongo* case, all Plaintiffs who indicated an onion piece rate less than $0.40 per bushel were assumed to have worked for that rate. Those who cited any wage rate in excess of $0.45 per bushel were reduced to the $0.45 rate.

*Chile Harvesting:*

1977: $0.25/basket

1978: none harvested

*Bell Pepper Harvesting:*

1977: $2.20/hour

*Cotton:*

1977: $2.50, $3.00, or $4.00/100 lbs.

Since there was no prevailing amount reported, the rate as stated on the individual interrogatory answer is used.

*Weeding:*

1977: $2.20/hour

1978: $2.97/hour

*General Farm Labor* (including irrigation, tractor driving, and other manual labor):

1977: $2.20

1978: $2.97

*Onion Tying & Transplanting:*

These tasks were paid at varying rates in both years. Inasmuch as the rates set forth in Plaintiffs' testimony and interrogatory answers were uncontradicted, those rates are used in the Judgment calculations.

The above rates were used in calculating the minimum wage damages of all workers, regardless of the rates claimed in the interrogatory answers or oral testimony, except as noted above with respect to onion transplanting operations and the cotton harvest in 1977, and

except as set forth below in the section discussing hourly wage activities.

*Hours and Days of Work*

A few of the growers kept reliable contemporaneous work records of their 1977 melon harvest. Where available, these records were used to determine the number of hours worked in melons. In all other respects, the interrogatory answers provide the best evidence of the hours worked in each crop activity and were used in the Judgments.

*Productivity Levels*

Productivity levels also varied from worker to worker and crop to crop. The evidence submitted at trial established that the productivity levels reported by each worker in answer to interrogatories are reasonable and were relied upon by the Court. Reliance on the interrogatory answers is especially appropriate in light of the fact that the growers kept no hourly records of piece-rate-work from which a more accurate productivity figure could be calculated.

The damage calculations are, therefore, derived from the individual work histories of the worker for each separate crop and grower, as contained in the interrogatory responses. If a class member was unable to remember his or her piece-rate productivity per day, the mean from all other reporting individuals is used in the minimum wage calculations for that worker.

*Additional Inferences*

Whether the Court relies upon the interrogatory answers or the testimony, it is necessary to make certain reasonable inferences to convert that evidence into a damage calculation. These inferences include the following:

1. If a range of values is given, e.g., "I worked 2-3 weeks," or "I picked 40-45 bags/hour," the mean of the high value and the low value is used.

2. If there is no indication of the number of days worked per day, five days is assumed.

3. If there is no indication of the number of hours worked per day, then eight hours is assumed.

4. If a worker indicated that he or she performed work from one month to another, the beginning date for the period is assumed to be the first day of the month and the ending date is assumed to be the 15th day of the month, unless the context indicates otherwise.

5. If any necessary item of information (other than the ones discussed in 2, 3, and 4 above) is missing from the interrogatory answers or testimony, the mean value for that item derived from all of the interrogatory answers is used.

6. If the cost of tools, medical services, wages in Mexico, or other expenses are expressed in Mexican currency, an exchange rate of $22.50MN per $1.00 is used for 1977 and $22.70MN per $1.00 is used for 1978, based upon tables from the International Monetary Fund (see Appendix C).

## IV.

## ELEMENTS OF ACTUAL DAMAGES CALCULATIONS

The damage calculations for each of the class members is divided into nine major elements, each of which is summarized immediately below and is described in greater detail in the subsection that follows;

1. *Contract.* Damages for violation of the contractual guarantee that wages would be paid for three-fourths of the work days of the visa period.
2. *Minimum Wages.* Damages for the difference between the wages actually received on an hourly basis and the federal guarantee of $2.20 per hour in 1977 and $2.97 in 1978.
3. *Transportation.* Damages for violation of the requirement that each worker receive a commuting allowance of $5 per week in 1977 and $8 per week in 1978.
4. *Housing.* Damages for violation of the agreement to pay a $5 per day housing allowance, in lieu of providing housing, to each worker who migrated from outside the Presidio/Ojinaga area in order to work for the Association.
5. *Equipment.* Damages for violation of the agreement to provide tools and equipment free of charge to the workers.
6. *Breach of Contract.* Damages for violation of terms of the work agreement, including the failure to pay for all hours worked.
7. *Personal Injury.* Damages for breach of the agreement to provide workers compensation or equivalent insurance for personal injuries which occurred during the course and scope of employment with the Association.
8. *Future Medical.* Damages for failure to reimburse injured workers for reasonable and necessary

future expenses for medical care, resulting from an on-the-job injury that was not covered by workers compensation or its equivalent.

9. *Mitigation*. Amounts which were earned or could have been earned by the exercise of reasonable diligence by each Plaintiff in seeking alternative employment in Mexico.

*Contract Damages (and amount of work guaranteed)*

The damages for violation of the "3/4 guarantee" are calculated by (1) determining the gross hours of work guaranteed, (2) subtracting from that the gross hours of work performed by each worker, and (3) multiplying that result by the guaranteed hourly rate for the year in question. The mitigation factor is separately expressed and is discussed below.

The testimony was uncontradicted that the 1977 visas were issued on June 9, 1977 and ran for six months, i.e, a period of 26 weeks. There is more of a question with regard to the number of contract hours per week. The 1977 Clearance Order and "Job Offer for Alien Employment" both indicated a contract that would provide 56 hours per week. The Visa Petitions stated a work week of "40 - 60" hours.

The regulations would not have permitted more than a six-day work week, 20 C.F.R. § 202(b)(6)(i), and work days were eight hours long. Thus, the Court is of the opinion that a work week was 40 hours long, so damages are based on a 40-hour work week.

There were a total of 1040 hours in the visa period (26 weeks x 40 hours/wk = 1040). Of these hours, 780 were guaranteed.

With regard to the one-year visas, the visas were valid until April 30, 1978. Thus, the total visa period covered 1880 hours, of which 1410 were guaranteed (47 x 40 x 3/4 = 1880).

The majority of the 1978 visas were issued for 70 days, and some visas were issued for one year. As in 1977, the visa petitions guaranteed 40 - 60 hours of work per week. Assuming the minimum of 40 hours per week, there were 400 hours of work during the 70-day visa period, of which 300 were guaranteed (10 wks. x 40 hours x 3/4 = 300 hours. There were 2080 work hours in the one-year visa period, of which 1560 hours were guaranteed 52 weeks x 40 hours x 3/4 = 1560 hours.

Whether a Plaintiff worked in 1977 or 1978, and whether she received a one-year or a shorter visa is, for the most part, determined from the interrogatory answers. In a few cases, reliance on oral testimony is appropriate to clarify the interrogatory answers. Appendix D sets forth the names of workers and the oral testimony which should be taken into consideration in determining the visa length.

The actual amount of work performed by each Plaintiff is generally calculated by adding the time worked in each crop or activity, as reported in the sworn interrogatory answers or proof of claim forms. As with the other damage calculations, the grower's admissions as to the crops they grew and the maximum duration of each harvest was considered, and work in crops which were

not grown in the year claimed or which were grown outside the visa period were disregarded.

*Minimum Wage Violations*

The most systematic and persuasive minimum wage violations occurred in the piece-rate crops, e.g., harvesting onion, cotton, and chile, transplanting onions, and similar activities. There was no record of the hours actually worked in the piece-rate operations. Unfortunately for all concerned, the only recourse has been to rely upon the recollections of hundreds of laborers.

To calculate the wage underpayments in the piece-rate activities, the piece rate paid for each operation is multiplied by worker's productivity level (e.g., units harvested per hour). The product of those two factors gives the employee's average hourly earnings rate, and that amount is multiplied by the estimated number of hours worked to give the actual pay the worker earned (observed pay). The minimum lawful pay (expected pay) is determined by multiplying the minimum rate - $2.20 or $2.97 - by the number of hours worked in the crop. Expected pay minus observed pay yields the minimum wage damages for that crop.

The factors necessary for making this calculation – the piece rate, productivity rate, and hours of work in a crop – are determined from the interrogatory answers and findings and inferences discussed above. No piece-rate damages are awarded in crops which were harvested before the visas were issued, or which were not grown in the year claimed.

Unlike the piece-rate operations, the growers generally paid hourly rate operations, such as the melon harvest, at the rates required by the visa/contracts: $2.20 per hour in 1977 and $2.97 per hour in 1978. The evidence reveals several glaring exceptions to the general compliance with the minimum wage on hourly crops.

Numerous witnesses claimed at trial that TRINI PENA, ANTONIO PENA, and several other growers in the Redford area paid less than the required hourly wage in both 1977 and 1978. No evidence was submitted to rebut this testimony, despite the fact that several of the accused growers took the witness stand. Another area of general noncompliance with the minimum wage requirements was with regard to irrigators, several of whom testified that they were only paid for eight hours while actually working a longer shift. Where such violations occurred, the number of hours claimed is the number used to calculate damages. However, the Court used a cap of 15 hours on such claims.

The Court's findings are for the most part calculated on the basis of the interrogatory answers. A minimum-wage damage amount was calculated for any class member whose effective hourly rate was less than the applicable wage rate for the season in question. That calculation is made for each crop, operation, or activity, by individual, by grower, and the results are included in the column title "Min, Wage," together with the piece-rate minimum wage damages.

*Transportation*

Under the contracts, all workers were entitled to a daily transportation allowance of $5 per week in 1977 and

$8 per week in 1978. How a worker actually chose to get to work - whether by walking or riding in his own or someone else's truck - is irrelevant to a worker's entitlement to transportation damages. The amount of transportation damages is calculated in the Proposed Judgments by multiplying $5 per week by the number of weeks in the visa period.

*Housing*

The 1978 visa petition and clearance orders submitted by the Defendant growers provided for the payment of a $5 per day housing allowance for all workers who lived outside reasonable commuting distance from Presidio. This amount is properly awarded to all Plaintiffs for the duration of the visa period. The fact that some may have found accommodations with relatives where they did not have to pay does not relieve Defendants of liability for housing allowance. Like transportation, the housing allowance was something guaranteed to workers, which they could spend as they saw fit.

The situation in 1977 was similar to 1978, except that the visa petitions did not specify the dollar amount to be paid in lieu of the furnishing of actual housing. Equity dictates that the same $5 per day allowance offered in 1978 represents a reasonable and fair housing allowance.

The housing damage in each case reflects the housing allowance for each worker who testified, either in person or through a proof of claim form, that he or she was required to migrate from outside the Presidio/Ojinaga area for this employment opportunity.

*Equipment*

The amounts paid for tools and equipment listed in the interrogatory answers generally conformed to the testimony at trial, and it is just and reasonable to use the interrogatory figures to calculate the damages owed for this violation. The damages for equipment indicate the amount of expenses that each worker estimated had been incurred for these items (e.g., scissors, baskets, hoes, cotton sacks, and similar items).

*Breach of Contract*

This category of damages includes several miscellaneous claims that do not fit well within the other contract damage categories. For example, several workers testified to being paid for fewer hours than they worked. Calculations for these claims are generally based on their interrogatory answers or proof of claim forms.

*Personal Injuries*

One of the terms and conditions of employment called for the Defendants to provide the H-2 workers with Workmen's Compensation or an equivalent insurance for any personal injuries that occurred during the course and scope of their employment with the Association. The Defendants failed to live up to this obligation. The Court must look to Texas Law as it existed in 1977 and 1978 to determine the scope of the Defendants' obligation.

Under Texas law, Defendants were obligated to provide compensation to any employee that was incapacitated for a period of at least one week, and were to pay for any medical expenses that were reasonably required at the time of an injury, and at any time thereafter as needed to cure or relieve the natural effects resulting from any injury. Texas Civil Statutes, Art. 8306, §§6 and 7. With the provisions of Texas Worker's Compensation law in mind, the Court turns its attention to the personal injuries the Plaintiffs claim were suffered in the course and scope of their employment with the Association.

*Frutoso Baca-Carabeo*

This plaintiff claims that he burned his right thigh while working for the Association. This injury allegedly happened when MR. CARABEO was lighting a fire. His claim is that his pants caught fire as he lit the fire. The Court does not find this claim to be credible; thus, this Plaintiff is to take nothing by his personal injury claim.

*Guillermina Primero-Aguirre*

This Plaintiff claims that she drove a stick through her right ankle while working in the scope and course of her employment. This injury required medical attention. The Court finds that this Plaintiff was injured in the course and scope of her employment.

The claimant was not incapacitated for more than one week, but she did incur medical expenses in the amount

of $125. Thus, the Court is of the opinion that GUILLERMINA PRIMERO-GUIRRE [sic] should recover $125 for the medical expense she incurred.

*Roberto Salazar-Martinez*

Plaintiff was injured in July 1977 when an irrigation pump he was working on exploded. The explosion caused third degree burns on 15% of the Plaintiff's torso and face. The Court is of the opinion that this injury occurred in the course and scope of Plaintiff's employment, and that he is entitled to compensation. Plaintiff suffered a partial permanent injury. The reasonable settlement value of this case is $8,000. Charlie Weinach paid $30 of the Plaintiff's medical expenses, but Plaintiff paid for $150 of his own expenses. The Court is of the opinion that Plaintiff is entitled to $8,150 for his personal injuries.

*Bertha Urguidi de Marquez*

This Plaintiff claims that she became ill after drinking the water the Defendants provided. The Court was not persuaded by her testimony and found her story to have no credibility. Accordingly, this Plaintiff is to take nothing with regard to her personal injury claim.

*Maximino Cabrera-Lopez*

Plaintiff seeks to recover the medical expenses he incurred from an injury he suffered while working for Defendants. This Plaintiff fell off of a cantalope trailer and hurt his arm and shoulder. The injuries were not serious, and Plaintiff was back at work the day after his

mishap. However, Plaintiff paid $50 for medical attention in Ojinaga, Mexico. The Court is of the opinion that this Plaintiff should recover $50 for his medical expenses.

*Lino Saenz Ruiz*

This Plaintiff was injured in May 1978 while working in the course and scope of his employment. The injury occurred while lifting a bundle of onions. Jose Rodriguez took Plaintiff to a hospital in Ojinaga. The grower paid for MR. SAENZ' doctor and for his three-day stay in the hospital. However, Plaintiff suffered a total and permanent injury for which he was not compensated. The evidence shows that Plaintiff suffered a disabling back injury and is likely in need of disc surgery. As such, the Court is of the opinion that this Plaintiff is entitled to $20,000 for a total and permanent injury, and to $5,000 for future medical expenses. Thus, Plaintiff is to be compensated for his personal injuries in the amount of $25,000.

*Guerrero Hinojos-Aguirre*

The personal injuries suffered by this Plaintiff shed light on the type of working conditions Defendants provided for the Plaintiffs. This Plaintiff, without the benefit of protective gear, was working with pesticides in a large vat. The solution was stirred with a stick. Working with the pesticides caused Plaintiff to have severe respiratory problems, and to vomit blood. Plaintiff paid $1,600 for medical attention in Ojinaga, Mexico. The Court is of the opinion that the compensation value of the case is $10,000. Accordingly, this Plaintiff is entitled to $11,600 for his personal injuries.

*Norberto Primero-Arteaga*

Plaintiff PRIMERO-ARTEAGA was injured while removing rock from one of the fields. The trailer Plaintiff was in tipped over, causing him to injure his head, back, and arm. The fall knocked Plaintiff out for 20 minutes. Plaintiff testified that he paid $2,000 for medical attention, and that his boss refused to allow him to come back to work. The Court is of the opinion that Plaintiff is entitled to $20,000 in compensation and to recover the amounts expended for medical attention.

The $20,000 reflects the settlement value of the case. Thus, Plaintiff is to recover a total of $22,000 for his personal injuries.

*Soteo Leyva Arevalo*

This Plaintiff claims that he became ill from drinking the water the Defendants provided. The Court is of the opinion that this is not a credible claim, and that Plaintiff is to take nothing for his alleged personal injury.

*Luis Anaya Terrazas*

This Plaintiff was seriously injured in the course and scope of his employment. He was impaled by a rebar while working, and was hospitalized for one month as a result of those injuries. Plaintiff incurred medical expenses in the amount of $5,000. The Court is of the opinion that the reasonable settlement value of this case is $6,000. Accordingly, Plaintiff is entitled to recover

$11,000 for the personal injuries he suffered while working for the Defendants.

*Armando Nieto-Mendoza*

This Plaintiff is seeking to recover for an illness he claims was caused by the drinking water the Defendants provided. The Court is of the opinion that this claim is without merit. Thus, NIETO-MENDOZA is to take nothing by this claim for his alleged personal injury.

*Ignacio Chavira Gutierrez*

This Plaintiff suffered a testicular hernia as a result of lifting some tractor machinery. Plaintiff told his supervisor, Jose Rodriguez, about the injury. Mr. Rodriguez took Plaintiff to the bridge, and Plaintiff walked to a doctor's office in Ojinaga. Dr. Jose Ibarra performed surgery on Plaintiff to correct the hernia. The operation required the doctor to remove part of the Plaintiff's injured testicle. Plaintiff spent $3,954 for the medical treatment he received. The injury suffered by Plaintiff would be considered a partial permanent injury, and would have a settlement value of $5,000. As such, Plaintiff is entitled to recover $5,000 in compensation and $3,954 for his medical expenses, or a total of $8,954 for his personal injuries.

*Carmen Tabarez Carrasco*

This Plaintiff claims that he hurt his foot while working for the Association. The Court is of the opinion that the testimony of this Plaintiff, with regard to his personal

injury, was not credible. Thus, this Plaintiff is to take nothing by way of his personal injury claim.

*Jose Aranda-Tabarez*

Plaintiff claims that he was injured and that he lost eight days of work because of his injury. The Court is of the opinion this Plaintiff's personal injury claims are not credible. As such, this Plaintiff is to take nothing by way of his personal injury claim.

*Nestor Calderon-Franco*

Plaintiff CALDERON twisted his ankle while working in the course and scope of his employment with the Defendants. The injury did not require Plaintiff to miss more than a week of work, so he is not entitled to any compensation. However, Plaintiff spent $150 for medical treatment of his injury. Thus, NESTOR CALDERON-FRANCO is entitled to recover $150 for the injury he suffered.

*Melton Carrasco Lujan*

Plaintiff alleges that he suffered from dehydration while he was working for the Defendants. The Court is of the opinion that this claim lacks credibility. Accordingly, this Plaintiff is to take nothing for his personal injury claim.

*Antonia Corral Madrid*

Plaintiff MADRID fell backwards off of a melon trailer and injured her back and her midsection. This

injury occurred while Plaintiff was in the course and scope of her employment. The Court is of the opinion that Plaintiff suffered a partial permanent injury that has a settlement value of $10,000. This injury is likely to require future medical treatment in the amount of $3,000. Accordingly, Plaintiff is entitled to $13,000 for the personal injuries she suffered.

*Jose Rios-Morales*

Plaintiff RIOS hurt his ankle while working in the course and scope of his employment with the Association. This injury did not require Plaintiff to miss more than a week of work, so Plaintiff is not entitled to any compensation. However, Plaintiff spent $150 for the treatment of his injury. Thus Plaintiff RIOS is entitled to recover $150 for the personal injuries he suffered.

*Raul Hernandez Armendariz*

Plaintiff claims that he suffered from dehydration while working the course and scope of his employment. The Court is of the opinion that this claim lacks credibility. Accordingly, this Plaintiff is to take nothing by way of his personal injury claim.

*Carmen Lara-Sanchez*

CARMEN LARA-SANCHEZ claims that she hurt her leg and back when she was working for the Defendants. This injury allegedly occurred when Plaintiff stepped in some mud. The Court is of the opinion that this story has no credibility. Plaintiff's proof of claim form serves to

reenforce the Court's opinion. In her proof of claim form, Plaintiff claims that she hurt her ankle. Nothing is said about the leg or back injury. She testified several times. Each time she testified her injury became worse. The Court finds the injury claims of this Plaintiff to be without any credibility whatsoever. Accordingly, CARMEN LARA-SANCHEZ is to take nothing by way of her personal injuries claim.

*Pedro Hinojos-Morales*

Plaintiff HINOJOS claims that he suffered from dehydration while working for the Defendants. The Court finds this claim to have no credibility. Accordingly, Plaintiff HINOJOS is to take nothing by way of his claim for personal injury.

*Merced Reyes Olivas*

Plaintiff claims that he suffered from a heat stroke while working for the Association. This illness happened while Plaintiff was doing some welding for the Association. Plaintiff paid for the medical treatment he received for this illness. The amount he paid totaled $300. Given the difficulty of medical substantiation in this case, the reasonable settlement value of this claim is $500. Accordingly, Plaintiff is entitled to receive $800 for the personal injury he suffered while working for the Defendants.

*Maria Piedra-Martinez*

Plaintiff Piedra-Martinez claims that she became ill from drinking the water the Defendants provided at the

worksite. The Court is of the opinion that this claim has no merit. Accordingly, this Plaintiff is to take nothing by way of her personal injury claim.

*Monserrat Corral de Rodriguez*

This Plaintiff suffered a cut on her right thumb and index finger while working for the Association. Memo Carrasco told this employee to keep working, despite the cut, or face the consequence of having her H-2 visa revoked. The injury to the fingers became infected, and resulted in the necessity of medical attention. The infection was treated for one month at a cost of $152. This type of injury is a specific injury and has a settlement value of $2,500. Accordingly, Plaintiff is entitled to $2,652 for the personal injury she suffered.

*Bivian Carrillo Valenzuela*

Plaintiff CARRILLO was injured while carrying a heavy sack in the rain. The Plaintiff slipped, and as a result, he hurt his back. This injury occurred in the course and scope of his employment. The injury has reduced Plaintiff's range of motion. The Court is of the opinion that this injury is a total and permanent disability that has a settlement value of $20,000. This condition will require future medical attention in the sum of approximately $5,000. Thus, this Plaintiff is entitled to $25,000 for the personal injury he suffered.

*Marcelino Olivas-Rodriquez*

MR. OLIVAS complained about wetness in his eyes that he claims was caused by his working condition. The

Court is of the opinion that there was no merit to this claim. Accordingly, Plaintiff OLIVAS is to take nothing for his personal injury claim.

*Encarnacion Baca-Carrillo*

Plaintiff BACA-CARRILLO broke his wrist while in the course and scope of his employment. Plaintiff's medical expenses were paid for and he was reimbursed for the time he was unable to work. Thus, Plaintiff is not entitled to any recovery for his personal injury claim.

*Guadalupe Valdez-Alvarado*

Plaintiff VALDEZ dropped a heavy sack on his foot while working in 1977. Plaintiff lost three days of work because of this injury, but he should have stayed off work for at least two weeks. The injury to Plaintiff's foot caused a mass to form on his foot. This mass had to be surgically removed at Plaintiff's expense. This injury resulted in some permanent injury to the foot. The Court is of the opinion that this injury has a reasonable settlement value of $1,000. Plaintiff spent $500 on medical attention; thus, Plaintiff is entitled to recover $1,500 for his personal injury.

*Juan Chavez Chaparro*

This Plaintiff was injured in 1978 while in the course of building a ditch for the Association. Plaintiff injured his back as a result of lifting a can filled with wet cement. This injury caused Plaintiff to miss two weeks of work. His back injury is still giving him problems, and he is in

need of medical attention. This condition is a partial permanent disability that has a settlement value of $12,000. The Court is of the opinion that future medical care in the amount of $5,000 is necessary. Accordingly, Plaintiff is entitled to recover the sum of $17,000 for his injuries.

*Mitigation*

No evidence regarding mitigation appears in the interrogatory answers. However, the testimony revealed that work in Mexico was scarce and sporadic. Women specially had little opportunity for jobs once their contracts were terminated. Wages in Mexico appear to have been approximately $2.50 to $3 per day ($70 MN/day) on days when work was available in such activities as construction, general labor and farm work. Given these facts, it is just and reasonable to make a general assumption that the Plaintiffs worked, or could have found work, for three days per week after their contracts were terminated. Therefore, a standard rate of $8.25 per week or $2.75 per day, in mitigation has been subtracted from the damages due each employee for each work day of the guaranteed period of the visa for which work was not available with the Presidio growers.

V.

In its initial Judgment, the Court held that the members of PVFA were jointly and severally liable for the Association's FLCRA violations. The Defendants did not

challenge this holding because PVFA was an unincorporated association in 1977, and under Texas law, the members of an unincorporated association are jointly and severally liable for the association's debts. However, by 1978 PVFA had been incorporated. The Court of Appeals held that, under those circumstances, the members of the Association could not be held liable for PVFA's FLCRA violations. These holdings are the law of the case with respect to Plaintiffs' FLCRA claims, but they do not resolve the issue of joint liability for Plaintiffs' contract damages.

Plaintiffs' FLCRA claims ran only against PVFA. Their contract claims, on the other hand, run against their employers. This Court has previously held that PVFA and its members were joint employers of the visa workers, and that holding was upheld by the Fifth Circuit. *See Salazar*, 765 F.2d at 1346; *Montelongo*, 765 F.2d at 1357. As joint employers, PVFA's members are jointly and severally liable for violations of the employment contract, even though they are not jointly liable for the Association's FLCRA violations. This principle is made explicit by the H-2 regulations in effect during the 1978 season:

> If an association of employers is a joint employer with its employer members, as defined in 655.200, the certification shall be made jointly to the association and the employer members. In such cases workers may be transferred among the employer members provided the employer members and the association agree in writing to be jointly and severally liable for compliance with the temporary labor certification obligations set forth in this subpart.

20 C.F.R. 655.206(b)(3) (1978). The injunction issuing the 1978 visas required the growers to comply with these

regulations. Thus, despite the Fifth Circuit's ruling with respect to FLCRA, all Defendants are jointly and severally liable for Plaintiffs' contract damages arising out of both the 1977 and the 1978 seasons.

*Pre-Judgment Interest*

The Court is of the opinion that Plaintiffs are not entitled to pre-judgment interest.

With respect to the damage award for the FLCRA violations, it is clear that pre-judgment interest is not allowed.

Regarding the damages for the breach of the work agreement, pre-judgment interest will not be allowed. This Court is very cognizant of the fact that this case has been around for almost 10 years. Plaintiffs' claims arose in 1977 and 1978; however, it was not until June 5, 1985 that the Texas Supreme Court allowed pre-judgment interest in claims similar to the one at hand. *Cavnar v. Quality Control Parking*, 696 SW2d 549 (1985). Were it not for the unusual nature and circumstances of this case, this cause would have been decided long before Texas recognized pre-judgment interest in this type of situation. To allow pre-judgment interest for the contract claims would simply not be just, especially in light of the fact that Plaintiffs are partially responsible for any delay in the resolution of this case. Furthermore, the Court is of the opinion that the Texas Supreme Court did not intend for *Cavnar* to apply to situations like the one before the Court.

More importantly, the Court is of the opinion that the Plaintiffs' contract claim is inextricably tied to the FLCRA claims. The Court takes notice that the FLCRA and the Fair Labor Standards Act (FLSA) are similar and interrelated. Both statutes serve to protect workers from abuses in the work place. Indeed, the FLCRA can be used to enforce rights conferred by the FLSA. *Castillo v. Givens*, 704 F.2d 181 (5th Cir. 1983). The FLCRA dictated what many of the contract terms had to provide. Some of the terms were rights protected by the FLSA.

The Court is of the opinion that the work agreement issues cannot be treated like the normal run-of-the-mill contract claim. The claims asserted are much like those that would arise under the FLSA, and it is well settled that in FLSA cases, pre-judgment interest is not allowed. *Foremost Dairies, Inc. v. Ivey*, 204 F.2d 186 (5th Cir. 1953); *Barcellona v. Tiffany English Pub*, 597 F.2d 464 (5th Cir. 1977); *Hill v. J. C. Penney Co.*, Inc. [sic] 688 F.2d 370 (5th Cir. 1982).

Thus, as many of the terms of the work agreement were dictated by the FLCRA, and because Plaintiffs used the FLCRA to enforce rights Plaintiffs had under the FLSA, the Court is of the opinion that prejudgment interest should not be awarded.

In closing, this Court has determined that Defendants have violated the FLCRA, and that they have breached their work agreement with the Plaintiffs. Plaintiffs are entitled to the liquidated damage award affirmed by the Fifth Circuit, and to their actual damages as set forth in Appendix A.

Because of the complex nature of any cause with more than 500 Plaintiffs in it, the Court has prepared this Memorandum Opinion and Order in such a way as to best explain this Court's decision and Judgment. In so doing, this Court has employed the attached Appendices. They should be considered as express Findings of Fact and Conclusions of Law in this action. The body of this Memorandum Opinion and Order should also be so considered. The Court has employed this approach so that, if any reviewing Court is of another opinion as to any controlling principle of law, that Court in its deliberations may render such judgment as it believes is proper in this action.

The Court will enter a Judgment based on the Findings of Fact and Conclusions of Law contained in this Opinion. An Order regarding attorneys' fees will be entered separately. Plaintiffs are to submit Affidavits concerning attorneys' fees within ten (10) days of the entry of Judgment.

SIGNED and ENTERED this 17th day of June, 1987.

/s/ Lucius D. Bunton
LUCIUS D. BUNTON
U. S. District Judge

**EXHIBIT J**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

| | | |
|---|---|---|
| AMADO SALAZAR-CALDERON, et al. | ) | |
| v. | ) | NO. P-81-CA-23 |
| PRESIDIO VALLEY FARMERS ASSOCIATION, et al. | ) | (Filed June 18, 1987) |

*JUDGMENT*

In accordance with the Findings of Fact and Conclusions of Law contained in this Court's Memorandum Opinion and Order entered contemporaneously herewith, the Court enters Judgment as follows:

IT IS ORDERED, ADJUDGED and DECREED that Plaintiffs have and recover from the Defendants, jointly and severally, the sum of SEVEN HUNDRED FIVE THOUSAND, SEVEN HUNDRED TEN and 53/100 DOLLARS ($705,710.53), which is to be awarded as as set forth in Appendix A of this Court's Memorandum Opinion and Order.

IT IS FURTHER ORDERED that the Defendants are entitled to an offset in the amount of SIXTY-EIGHT THOUSAND EIGHT HUNDRED THIRTY-ONE and 36/100 DOLLARS ($68,831.36) for the sums they have deposited in the Court's registry.

IT IS FURTHER ORDERED that Defendants pay all costs of court incurred herein, for which execution may issue if not timely paid.

SIGNED and ENTERED this 17th day of June, 1987.

/s/ Lucius D. Bunton
LUCIUS D. BUNTON
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

| | | |
|---|---|---|
| PRESIDIO VALLEY FARMERS ASSOCIATION, et al. | ) | |
| v. | ) | NO. P-82-CA-15 |
| ANTONIO MONTELONGO, et al. | ) | (Filed June 18, 1987) |

*JUDGMENT*

In accordance with the Findings of Fact and Conclusions of Law contained in this Court's Memorandum Opinion and Order entered contemporaneously herewith, the Court enters Judgment as follows:

IT IS ORDERED, ADJUDGED and DECREED that Defendant/Counter-Plaintiffs recover from Plaintiff/Counter-Defendants, the sum of THREE HUNDRED THIRTY-THREE THOUSAND SEVEN HUNDRED EIGHTEEN and no/100 DOLLARS ($333,718). These sums are to be awarded to each Defendant/Counter-Plaintiff as set forth in Appendix A of this Court's Memorandum Opinion and Order. Plaintiff/Counter-Defendants are liable

jointly and severally for the work agreement claims; however, as to the liquidated damages awarded pursuant to 7 U.S.C. §2041, *et seq.*, liability is imposed individually.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the Plaintiff/Counter-Defendants are entitled to an offset in the amount of EIGHTY-FOUR THOUSAND, ONE HUNDRED FIFTY-NINE and 7/100 DOLLARS (84,159.07) for the sums they have deposited in the Court's registry.

IT IS FURTHER ORDERED that Plaintiff/Counter-Defendants are to pay all costs of court incurred herein, for which execution may issue if not timely paid.

SIGNED and ENTERED this 17th day of June, 1987.

/s/ Lucius D. Bunton
LUCIUS D. BUNTON
United States District Judge

Supreme Court, U.S.
FILED
JUL 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2086

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

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AMADO SALAZAR-CALDERON, *et al.*,
*Petitioners,*
*v.*
PRESIDIO VALLEY FARMERS ASSOCIATION, *et al.*,
*Respondents.*

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## RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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THOMAS J. BACAS
940 Sweetwater Lane
Boca Raton, Florida 33431
*Attorney for Respondents*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

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NO. 88-2086

AMADO SALAZAR-CALDERON, *et al.*,
*Petitioners,*
*v.*
PRESIDIO VALLEY FARMERS ASSOCIATION, *et al.*,
*Respondents.*

---

Respondents Presidio Valley Farmers Association, *et al.* submit this brief in opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit filed by petitioners Amado Salazar-Calderon, *et al.*

## I. THE FIFTH CIRCUIT'S DECISION THAT THE DISTRICT COURT'S CLASS CERTIFICATION RULINGS ON REMAND DID NOT RELATE BACK DOES NOT CONFLICT WITH ANY DECISIONS OF THIS COURT OR OF OTHER CIRCUITS. THE FIFTH CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S DECISIONS IN AMERICAN PIPE & CONSTRUCTION CO. V. UTAH AND CROWN, CORK & SEAL CO. V. PARKER.

The district court's original decisions to deny class certification in both cases were affirmed by the Fifth Circuit on the original appeals. On remand, the district court certified classes in both cases and held that its class certifications related back to the original filing of the class actions, thus reviving the claims of many individuals that otherwise would have been barred. Although the Fifth Cir-

cuit upheld the class certifications on remand, it ruled that "[t]he two-year statute of limitations had run during the time between the original denial and the district court's reversal" and that the belated class certifications did not revive claims that had become time-barred.[1] 863 F.2d at 390. The Fifth Circuit's ruling denying relation-back effect to the subsequent class certifications does not conflict with any other circuit court decisions and comes squarely within the guidelines of this Court governing class action tolling.

In trying to establish that the Fifth Circuit's decision has "carved out an exception to the 'relation back' principle," Petition for Certiorari, at 11, petitioners have attempted to obscure the major difference between this case and other situations where relation-back is clearly and undisputedly justified. The rules governing class action tolling are clear. There is no dispute that the filing of a class action tolls the statute of limitations for all members of the prospective class. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 553 (1974); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353 (1983). As a result of such tolling, a district court's decision to certify a class action relates back to the date the class action was first filed, even when the decision to certify the class comes many years after the class complaint was filed. A corollary of the general rule is that such tolling ceases and the statute of limitations begins to run anew when the district court denies class certification. *American Pipe & Construction Co.*, 414 U.S. at 561; *Crown, Cork & Seal Co.*, 462

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[1]In the *Salazar* case, class certification was originally denied on March 30, 1981 and was granted on remand on April 18, 1986, more than five years later. In the *Montelongo* case, class certification was originally denied on April 5, 1983 and was granted on remand on April 18, 1986, more than three years later. The applicable statute of limitations was two years. 863 F.2d at 390; 765 F.2d at 1351.

IN THE

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U.S. at 354. At that point, members of the putative class who wish to preserve their claims must either intervene or file separate actions within the time remaining before the statute of limitations expires. *Id.*

There is one exception to the rule that tolling ceases and the statute of limitations begins running anew upon denial of class certification. It has been held that when a court of appeals *reverses* a district court's *denial* of class certification the certification ruling relates back to the date that the original class complaint was filed. *See, e.g., Gelman v. Westinghouse Elec. Corp.,* 556 F.2d 669, 701 (3rd Cir. 1977); *Satterwhite v. City of Greenville,* 578 F.2d 987, 997 (5th Cir. 1978) (en banc). The justification for allowing relation-back in such cases is to preserve the right to appellate review. Since interlocutory orders (such as orders denying class certification) are not appealable until a final judgment is rendered, "[a]ny other rule [than relation-back to the date the class action was initiated] would result in denying class members any meaningful appellate review, since, in most cases, such review will not be available until after the applicable limitations period has run." *Gelman,* 556 F.2d at 701.

This case clearly does not come within the limited exception allowing relation-back where the court of appeals *reverses* the denial of class certification. The petitioners sought appellate review of the district court's original denial of class certification and were unsuccessful in persuading the Fifth Circuit to reverse the district court's denial of class certification, so the justification for allowing relation-back in the limited exception cited above does not apply to this case. Petitioners obtained meaningful appellate review; they simply lost their appeal.

The Fifth Circuit's ruling that tolling ceased and the statute of limitations began to run anew when the district court originally denied class certification follows this Court's rulings in *American Pipe & Construction Co.* and *Crown, Cork & Seal Co.* Furthermore, the Fifth Circuit's

conclusion that the district court's belated class certifications on remand did not revive claims which had become time-barred in the interim is consistent with a long line of cases holding that no class action may proceed on behalf of class members whose claims are barred by the applicable statute of limitations and that certification of a class action does not revive barred claims. *See, e.g., Domingo v. New England Fish Co.,* 727 F.2d 1429, 1442 (9th Cir. 1984); *Laffey v. Northwest Airlines, Inc.,* 567 F.2d 429 (D.C. Cir. 1976); *Escott v. Barchris Construction Corporation,* 340 F.2d 731, 733 n.3 (2d Cir. 1965); *Burns v. Ersek,* 591 F.Supp. 837, 839-42 (D.Minn. 1984); *Healy v. Loeb Rhodes & Co.,* 99 F.R.D. 540, 543 (N.D.Ill. 1983); *Schmidt v. Interstate Fed. Sav. & Loan Ass'n,* 74 F.R.D. 423, 428 (D.D.C. 1977).

The Fifth Circuit's decision in this case does not conflict in any way with decisions of this Court or other circuit courts. Counsel for the petitioners conceded in oral argument before the Fifth Circuit that petitioners had no cases to support their argument concerning relation-back in this case. In their petition, petitioners also admit that "the issue in its narrowest form has not been addressed by other courts." Petition for Certiorari, at 10. They contend, however, that the Fifth Circuit's decision is in conflict "in principal" with several decisions of the Third Circuit. The two Third Circuit cases now cited by petitioners to support their erroneous claim that there is a conflict in circuit court decisions are clearly distinguishable from this case and do not stand for the principle petitioners seek to establish. The two cases, *Neely v. United States,* 546 F.2d 1059 (3rd Cir. 1976), and *Norris v. Frame,* 585 F.2d 1183 (3rd Cir. 1978), clearly fall within the limited exception cited above, since in both cases the Third Circuit held that the district court had acted improperly in denying class certification and reversed the denial of class certification.

In *Neely,* the Third Circuit reversed the district court's denial of class certification on the ground that the district

court made a determination that the class was unmanageable without taking into account data regarding the difficulty of determining class membership. *Id.* at 1071 Although the court of appeals emphasized "that we are not ordering the certification of a class," *id.* at 1971, the fact that it negated the denial of certification and the fact that the district court could certify the class on remand after considering data it had failed to take into account prior to the appeal brings this case squarely in line with those cases where the court of appeals reverses the denial of class certification.

Similarly, in *Norris,* the Third Circuit determined that the district court had used an improper standard in denying class certification. The court of appeals held that the district court had improperly used the standard applicable to (b) (3) classes in ruling on a (b) (2) class and remanded to the district court for it to redetermine the propriety of class certification. The *Norris* case also fits squarely within the line of cases where the court of appeals reverses the denial of class certification.

There is no merit to petitioners' contention that "[d]enying full relation back effect to the certification decision creates an unnecessary level of uncertainty and doubt in the minds of potential members of any Rule 23(b) (3) class." Petition for Certiorari, at 16. The hollowness of petitioners' argument is readily apparent when one considers that the district court could have denied class certification following remand from the court of appeals. Petitioners could not possibly argue that the time-barred individuals could then have pursued their individual actions, since the time for intervening or filing separate actions would have long since passed. This Court has made clear in *American Pipe* and *Crown, Cork & Seal* that, once a district court denies class certification, members of the putative class must take the necessary steps to preserve their claims within the time remaining before the statute of limitations expires. In fact, petitioners were

fully aware of their obligation. They pointed out to the district court, in connection with the *Montelongo* case, that "[a]fter the class certification was denied April 5, 1983, the statute of limitations began to run against the class, but because the statute had been tolled since July 13, 1978, Intervenors had ample time to preserve their claims and did so." *Montelongo,* Intervenors' Response to Counter-Claim Defendants' Motion for Summary Judgment, at 12-13 (November 14, 1983).

In fact, many of the petitioners who sought to use the district court's certification rulings to revive their moribund claims actually sought to intervene or file separate actions following the district court's original denial of class certification. For various reasons, the claims of most of these individuals were originally denied by the district court and the court of appeals. 863 F.2d at 390; 765 F.2d at 1351-52. On remand, the district court relied on its relation-back decision to include in the resurrected class three groups of workers whose claims had been previously barred. Thus, it was not simply a matter of the statute of limitations which barred recovery by many of the petitioners, but the doctrines of *res judicata* and law of the case, as well.

Finally, if this Court were to grant the petition as to this issue, it would be necessary for the Court to consider the propriety of the district court's certification of the classes following remand. The growers challenged the grant of certification both in the district court and in the court of appeals on the ground that certification of the classes following remand violated Fed.R.Civ.P. 23(c) (1) since a decision had already been rendered on the merits and that the requirements of Fed.R.Civ.P. 23(b) (3) were not met since the only remaining issue was the individual determination of damages to award each plaintiff.

## II. THE FIFTH CIRCUIT DID NOT ERR WHEN IT HELD THAT THE DISTRICT COURT VIOLATED THE APPELLATE COURT'S EARLIER MANDATE BY FINDING THE GROWERS LIABLE ON REMAND UNDER A LEGAL THEORY OF RECOVERY NOT EVEN URGED ON THE FIRST APPEAL. THE DEFENDENT GROWERS PRESERVED THEIR POINT BOTH BEFORE THE DISTRICT COURT AND THE COURT OF APPEALS.

Petitioners contend that the Fifth Circuit erred when it held that the district court violated the mandate of the original appeal on remand when it held the growers liable under state law for breach of contract,[2] a legal theory not relied on by the district court in its original decision and not urged by petitioners in their original appeal to the Fifth Circuit. The Fifth Circuit held that its original decision had merely remanded one FLCRA violation to the district court for a redetermination of damages and "did not reopen the legal theory involved." 863 F.2d at 387. Petitioners contend that their second issue raises "an important question of federal law," namely, "the deference that an appellate court should extend to the district court in the interpretation of an admittedly vague mandate." Petition for Certiorari, at 10. Not only have the petitioners failed to present an issue that warrants the attention of this Court, but their argument rests on three false premises.

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[2]Three separate issues hinged on the new legal theory. By utilizing a different theory of recovery, the district court sought to circumvent the Fifth Circuit's ruling that the individual growers were not jointly and severally liable for the Association's FLCRA violations in the 1978 case. *See* Petition for Certiorari, at App.129-App.131. In addition, the district court relied on the new legal theory to award attorney's fees to petitioners, something it had not done prior to the original appeal. The Fifth Circuit reversed the district court on both points. 863 F.2d at 387. Petitioners also sought to use the change in legal theory as an opportunity to seek prejudgment interest, but both the district court and Fifth Circuit rejected their claim. 863 F.2d at 392.

First, petitioners contend that the court of appeals reversed the district court on this point "without explanation." Petition for Certiorari, at 17. The Fifth Circuit's opinion, however, explained that

> . . . We originally vacated the trial court's damage award for a sixth FLCRA violation, "failure to abide by the working arrangement." We remanded the case to allow the district court to redetermine damages for that FLCRA violation in light of "additional terms" that we found were part of the work agreement. *Salazar,* 765 F.2d at 1353; *Brock,* 765 F.2d at 1353; *Brock,* 765 F.2d at 1357. We did not reopen the legal theory involved. Yet, on remand, the district court found PVFA liable under a legal theory not urged in the original appeals, breach of state law contract. This finding reaches beyond our original mandate, and we reverse the district court's findings insofar as they are based on a state law breach of contract theory. *See Stamper v. Baskerville,* 724 F.2d 1106, 1107-1108 (4th Cir. 1984) (trial court may decide matters left open on remand only insofar as they are consistent with appellate court's mandate).

863 F.2d at 387. The petitioners' claim that the Fifth Circuit reversed the district court on this point "without explanation" is clearly false.

Secondly, the petitioners contend that the defendant growers failed to properly raise the issue, a charge that the record clearly reveals to be false as well. When the case was remanded to the district court, the growers filed a written status report with the district court pointing out that

> [w]ith respect to the Association, the only issues left to be resolved involve the alleged FLCRA violation for breach of the work agreement by the Association. In connection with this issue, the Court must determine (1) whether the workers waived actual damages, (2)

> which workers are entitled to recover from the Association for this breach of FLCRA, and (3) how much damages are to be awarded for this breach of FLCRA . . . With respect to the individual grower members of the Association, the only issues left to be resolved involve the two alleged violations of FLCRA. . . .

*Presidio Valley Farmers Association v. Brock,* Counterclaim Defendants' Status Report, at 2 (April 4, 1986). The district court did not make clear that it was relying on a different legal theory until it handed down its memorandum decision and order and final judgment on June 17, 1987, leaving the growers no recourse but an appeal to the Fifth Circuit.

The petitioners' contention that the defendant growers had not raised this issue on appeal to the Fifth Circuit simply ignores the numerous references to this issue in the briefs that the growers filed with the Fifth Circuit. The growers stated in their Reply Brief that

> . . . the workers miscontrue what the Fifth Circuit decided when it remanded this case back to the district court for a reassessment of damages. The Fifth Circuit did not reopen the question of whether the workers could pursue on remand an entirely different claim that they had abandoned prior to the original appeal and had not raised on the first appeal to the Fifth Circuit . . . The Fifth Circuit ruled that the "[t]he damages award for breaches to the work agreement is vacated and remanded for redetermination. . . ." 765 F.2d at 1359. The Fifth Circuit did not direct or authorize the district court to retry the case on a different legal theory.

Reply Brief for Appellants, at 3, 5. Later, in the same brief, the growers stated that

> [a]s noted earlier, to the extent the district court based its judgment on the state law contract claim, it went beyond the mandate of the Fifth Circuit. The

> Fifth Circuit had merely vacated the award of damages for one FLCRA violation and remanded for a redetermination of damages for that one violation. It did not thereby reopen for relitigation a claim which the workers had not pursued in the district court or on their earlier appeal.

*Id.* at 33-34. Later, in the same brief, the growers responded to the workers' cross appeal on the prejudgment interest issue by noting that

> . . . as pointed out earlier, the workers miscontrued the mandate of the Fifth Circuit in the earlier appeals. The Fifth Circuit decided that the award of damages for the one FLCRA violation should be vacated and reassessed in light of the additional work terms. The Fifth Circuit did not remand for the purpose of relitigating the case on a different legal theory, especially one that had not been pressed below prior to the original appeal and was not part of the original appeal. The remaining cause of action still remained one based on FLCRA, not a common law breach of contract.

*Id.* at 36.[3] Thus, the petitioners' second issue ("Whether the court of appeals erred in reversing the district court's interpretation of the mandate where defendants did not object to that interpretation in the district court or on appeal") is completely undercut by the fact that the growers clearly preserved their position both in the district court and the court of appeals.

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[3] *See also Salazar*, Brief for Appellants, at 27 ("The only issue left to be resolved was the proper amount of damages to assess for the one FLCRA violation which the Fifth Circuit had vacated on appeal.") and 44 ("As noted earlier, what the Fifth Circuit did was reverse the award of damages for the one FLCRA violation (breach of work agreement) while upholding the award of damages for the other five FLCRA violations. The remand for redetermination of damages for the one vacated FLCRA violation did not convert the action into one for breach of contract.")

Thirdly, the mandate of the earlier appeal was clear, not "vague," as the petitioners contend. Petition for Certiorari, at 10. The Fifth Circuit had clearly remanded the case for a redetermination of damages for the one FLCRA violation, not to try the case on a different legal theory.[4] In fact, as the Fifth Circuit noted in its opinion, the district court relied on a legal theory on remand that the workers had not even urged in the original appeals. 863 F.2d at 387. The court of appeals was certainly in a better position than the district court to determine what its mandate was and to determine what issues had been preserved on appeal by the petitioners. Circuit Judge Higginbotham, who wrote both opinions on the first appeals, also served on the panel that heard the second appeals. Moreover, the workers raised this same issue in the petition for rehearing *en banc* filed with the Fifth Circuit, and not one judge on the Fifth Circuit requested a poll of the court, not even the other active judge who served on the original panel which issued the mandate in question.

Even apart from their false charges, the petitioners have not otherwise raised any valid claim that would warrant this Court's attention. In asking this Court to side with the district court over the court of appeals as to the proper interpretation of the court of appeals' mandate, petitioners are trying to put the cart before the horse. This Court has stated in the strongest terms that ". . . an inferior court has no power or authority to deviate from the mandate issued by an appellate court." *Briggs v. Pennsyl-*

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[4]In *Salazar*, the Fifth Circuit had stated that "[b]ecause we have concluded that additional terms were part of the work agreement, however, we remand the award of damages for defendants' alleged breaches of the agreement and remand so that the district court can award damages for those terms and so that it can consider the parties' other complaint about the award." 765 F.2d at 1353. In *Brock*, the Fifth Circuit had stated that "[t]he damages award for breaches of the work agreement is vacated and remanded for redetermination. . . ." 765 F.2d at 1359.

*vania R. Co.*, 334 U.S. 304, 306 (1948). To allow the district court to override the court of appeals' interpretation of the appellate mandate would eviscerate the rule that the lower court must follow the decision of a higher court at an earlier stage of the case and seriously undermine the authority of the appellate courts.

## CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari filed by petitioners should be denied as to both issues.

Respectfully Submitted,

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